Supreme Court, U.S.
FILED

(1)

No. 97 942 DEC - 8 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

IN RE: AMTRAK "SUNSET LIMITED" TRAIN CRASH IN BAYOU CANOT, ALABAMA, ON SEPTEMBER 22, 1993,

JAMES ALTOSINO; MARIE V. ALTOSINO; JOHN L. ANDERSON; ALICE ANELLO; JOSEPH ANELLO, ET AL.,

v. *Petitioners,*

WARRIOR & GULF NAVIGATION COMPANY, WILLIE C. ODOM; ANDREW STABLER; CSX TRANSPORTATION, INC., AND NATIONAL RAILROAD PASSENGER CORP., D/B/A AMTRAK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRITT OF CERTIORARI

STEPHEN D. HENINGER
Counsel of Record
S. GREG BURGE

HENINGER, BURGE & VARGO, LLP
1500 Financial Center
Birmingham, Alabama 35203
205/322-5153
205/322-6706 (Fax)

JOSEPH M. BROWN, JR.
DAVID G. WIRTES, JR.

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN, LLC
1601 Dauphin Street
P.O. Box 66705
Mobile, Alabama 36604
334/471-6191
334/479-1031 (Fax)

JAMES J. THOMPSON, JR.
BRUCE M. MCKEE

HARE, WYNN, NEWELL & NEWTON
290 North 21st Street
Birmingham, Alabama 35203
205/328-5330
205/324-2165 (Fax)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

122 pp.

QUESTIONS PRESENTED

1. Whether in a personal injury case that falls within federal admiralty jurisdiction, a nonseafarer injured on land or in state territorial waters may recover punitive damages under state law as supplemental to general maritime law.

2. Whether in a personal injury case that falls within federal admiralty jurisdiction, a nonseafarer injured on land or in state territorial waters may recover punitive damages under the general maritime law.

RULE 14.1(b) LIST OF PARTIES

All parties to the proceedings below are listed in the style of the case. In addition, a list of all interested persons, provided to the Eleventh Circuit is included as Appendix E to this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(b) LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. This Court should clarify *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), by expressly deciding that nonseafarers who are injured in state territorial waters have the same right to seek punitive damages under state law as the beneficiaries of nonseafarers who are killed in state territorial waters 6

A. This case presents the opportunity to resolve an issue expressly reserved by this Court in footnote 14 in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 629, 133 L. Ed. 2d 578 (1996), *i.e.*, the apparent conflict between maritime wrongful death claims and maritime personal injury claims 6

B. The interests of federalism and the spirit of the "saving to suitors" clause (28 U.S.C. § 1333(1)) require that states be permitted to continue to play their historical role in providing "remedies" to supplement the general maritime law where maritime events implicate state interests, such as where nonseafarers are killed or injured within a state or in state waters 11

TABLE OF CONTENTS – Continued

Page

C. Fairness and common sense require that nonseafarers injured in state territorial waters be allowed to avail themselves of state supplemental remedies such as punitive damages 13

II. This Court should remove the widespread confusion in the courts below by reiterating its long established rule that punitive damages are an appropriate element of damages in maritime tort cases including personal injury cases, except to the extent that Congress has indicated to the contrary 14

A. It is essential that this court resolve the conflict that has manifested itself between the Court's rationale in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and its rationale in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 629, 133 L. Ed. 2d 578 (1996) 14

B. Except to the extent that Congress has indicated to the contrary, punitive or exemplary damages continue to be recoverable in tort actions under the general maritime law and may be recovered where appropriate in personal injury cases 21

C. Denial of punitive damages in personal injury actions when they are available in death actions and in property loss or damage cases has no rational basis in law or policy and, in that respect, is constitutionally troubling 24

TABLE OF CONTENTS – Continued

Page

III. The goal of uniformity will be better served if punitive damages remain part of the general maritime law and available in personal injury cases. The goal of uniformity also will be better served if state punitive damage remedies are equally available to nonseafarers injured in state territorial waters as they are in wrongful death actions 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adler v. Royal Cruise Line, Ltd., WL 438799, 1996 A.M.C. 1349 (N.D. Cal. 1996) 21, 26

American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 127 L. Ed. 2d 285 ..... 8, 11, 12, 23

The Amiable Nancy, 16 U.S. 546, 4 L. Ed. 456 (1918) 22, 25, 27

Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1953) 24

Cameron Boat Rentals, Inc., 683 F. Supp. 577 (W.D. La. 1988) 19

Carlissa Churchill v. F/V Fjord, 892 F.2d 762 (9th Cir. 1987) 18

Carlson v. Green, 466 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) 23, 24

CEH v. F/V Seafarer, 70 F.3d 694, 1996 A.M.C. 467 (1st Cir. 1990) 26

Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1994 A.M.C. 2642 (9th Cir. 1994) 20, 26

The D.S. Gregory and the George Washington, 7 Fed. Cas. 1122 (S.D.N.Y. 1868) 22

Day v. Woodworth, 54 U.S. 363, 14 L. Ed. 181 (1851) 23

Dunn v. Penrod Drilling Company, 660 F. Supp. 757 (S.D. Tex. 1987) 18

TABLE OF AUTHORITIES – Continued

Page

East River Steamship Corp. v. TransAmerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295 (1986) 9

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 22, 27

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988)..... 12

Garner v. Dravo Basic Materials Co., 768 F. Supp. 192 (S.D. W.Va. 1991)..... 18

The General Rucker, 35 F. 152 (W.D. Tenn. 1888)..... 22

Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495, 1995 A.M.C. (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 708 (1996) 19, 20

Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) 3

Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1995 A.M.C. 2409 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 706 (1996) 19, 21

Hess v. United States, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960).....8, 9

Hoeffner v. National S.S. Co., 1 F.2d 844 (9th Cir. 1924)..... 22

Horsley v. Mobil Oil Corp., 15 F.3d 200 (1st Cir. 1994)..... 20

In Re Amtrak "Sunset Ltd." Train Crash, 121 F.3d 1421 (11th Cir. 1997)..... 4, 5, 17

TABLE OF AUTHORITIES – Continued

Page

Int'l Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979) 24

Kermarec v. Compagnie General Transatlantique, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959) 8

Lake Shore and M.S. Ry. Co. v. Prentice, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893) 23, 27

Lollie v. Brown Marine Service, Inc., 995 F.2d 1565 (11th Cir. 1993)..... 17

The Ludlow, 280 F. 162 (N.D. Fla. 1922)..... 22

McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965)..... 9

Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir. 1992)..... 17

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)..... *passim*

Miller v. Baltimore & O.R. Co., 17 F. Cas. 304 (Cir. Ct. S.D. Ohio 1876)..... 23

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)..... 4, 8, 9

Murray v. Anthony J. Bertucci Constr. Co., 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865, 113 S. Ct. 190, 121 L. Ed. 2d 134 (1992)..... 17

P&E Boat Rentals, Inc. et al. v. Stoufflet, 872 F.2d 642 (5th Cir. 1989)..... 18

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991)..... 24

Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984)..... 9

TABLE OF AUTHORITIES – Continued

Page

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) 8

Ragland v. Norfolk and Washington (D.C.) Steamboat Co., 163 F. 376 (E.D. Va. 1908) 22

Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) 8, 10, 11

Schweiker v. Wilson, 450 U.S. 221, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981) 25

Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966) 10

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) 25

Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993) 20

Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625 (1983) 24

Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir. 1986) 12

Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959) 8, 9

Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1060 (1994) 21

Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921) 10

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) 12

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) .. *passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES:

U.S. CONST. amend. V 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1333(1) 11

33 U.S.C. § 901 7

46 U.S.C. app. § 688 7

46 U.S.C. app. § 740 3

46 U.S.C. app. § 761 7

OTHER:

ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 12, PRINCETON UNIVERSITY PRESS (1997) 23

RICHARD L. BLATT, ROBERT W. HAMMESFAHR AND LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (1996 Pocket Part) 27

2 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES (3d ed. 1995) 27

Robert Force, *The Curse of* Miles v. Apex Marine Corp.: *The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995) 15

Robert Force, *Post-*Calhoun *Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 TUL. MAR. L.J. 7 (1996) 27

PETITION FOR WRIT OF CERTIORARI

On September 11, 1997, the Eleventh Circuit held that punitive damages may not be recovered by nonseafarers who suffer personal injuries in state territorial waters. Personal injury plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals (Appendix A, *infra*) is reported at 121 F.3d 1421 (CA 11 1997). The district court's decision (Appendix C, *infra*) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 11, 1997. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

U.S. CONST. amend. V is set forth in Appendix F.

STATEMENT

On September 22, 1993, at or about 2:45 a.m., a commercial towing vessel, the M/V MAUVILLA, and two of its six barges, owned and operated by Warrior & Gulf Navigation (WGN), struck a railroad bridge, owned and maintained by CSX Transportation, Inc. (CSX), while navigating in waters in Alabama. The bridge extended over Big Bayou Canot, a 14-mile long tributary of the Mobile River located near Chickasaw, Alabama, in Mobile

County. At the time, the vessel which was traveling north on the Mobile River veered into the mouth of Big Bayou Canot, a tributary of the Mobile River, while the pilot was searching for a place to secure the vessel and its tow because of a heavy fog that had settled on the river. Believing he was still navigating in the Mobile River, the pilot attempted to secure his vessel to what he believed to be another vessel which appeared on his radar screen. The object was in fact the railroad bridge, which traverses the bayou. It is located approximately one-half mile from the point at which the bayou originates in the Mobile River and is approximately 400 feet long. The allision laterally displaced the bridge and railroad tracks.

Soon after the allision, a passenger train owned and operated by the National Railroad Passenger Corporation (Amtrak) derailed as it attempted passage over the bridge. Three locomotives, a baggage car, a crew dormitory car, and two passenger coaches plunged into the bayou. Four cars remained on the portion of the bridge that was still standing. Forty-seven passengers and crew members perished in the ensuring crash; scores of others were injured.

Subsequently, representatives of several of the deceased and injured persons filed suit, principally against WGN, CSX, Amtrak and Willie C. Odom and Andrew Stabler, the captain and the pilot of the MAUVILLA. Several lawsuits originated in federal court and attempted to invoke the court's diversity and federal question jurisdiction. Other lawsuits originated in state court but were removed by defendant Amtrak, a federally-chartered corporation, to the United States District Court for the Southern District of Alabama. The Judicial

Panel on Multidistrict Litigation consolidated the lawsuits in that court for the purpose of all pretrial proceedings. At the time of the district court's decision, one hundred and twelve personal injury and wrongful death cases were pending in that court, representing the claims of forty-three of the deceased and seventy-four of the injured. A majority of the suits were filed after the issuance of the Judicial Panel on Multidistrict Litigation's consolidation order, most averring jurisdiction by virtue of that order.

It was initially determined by the district court and counsel that it was desirable to have a pretrial determination by the court of the law applicable to the personal injury and wrongful death claims. The court determined that it had two principal issues to resolve. First, whether the court had admiralty jurisdiction over the case; second, assuming the court had admiralty jurisdiction, which law ("state or admiralty") applied to the case – principally what damages were recoverable by the personal injury and wrongful death plaintiffs. In its decision on these issues, the district court held that admiralty jurisdiction existed under the Admiralty Extension Act, 46 U.S.C. app. § 740, and *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995), over the action but that under *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), it was obliged to "apply Alabama's wrongful death statute as surrogate admiralty law in determining the wrongful death beneficiaries and the damages that are recoverable by them." It also held that the personal injury claims would be subject to the general maritime law and that such law allowed the personal injury plaintiffs to pursue nonpecuniary damages that included

loss of consortium, loss of society, and punitive damages. (Appendix C)

The district court noted its willingness to grant an interlocutory appeal on any or all of the issues addressed in its opinion and an appeal was filed by WGN, Odom, Stabler, CSX, and Amtrak. The appeal was from the rulings of the district court, adverse to them, that the Alabama wrongful death statute, Ala. Code Section 6-5-410 (1993), applied to all aspects of the wrongful death claims in the action and that the personal injury plaintiffs may recover punitive damages and damages for loss of society and consortium. The court of appeals vacated the decision of the district court on both rulings and remanded the action for further consideration. The court of appeals held:

> that the district court in applying the Alabama wrongful death statute to the wrongful death claims in this action insofar as such Alabama statute provides for the recovery of punitive damages for simple negligence only and prohibits apportionment of fault and damages among tort feasors. (*In Re Amtrak "Sunset Ltd." Train Crash*, 121 F.3d 1421, 1427 (11th Cir. 1997)).

Nevertheless, it held that the wrongful deaths plaintiffs had:

> available to them the remedies provided in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970). In addition, although such plaintiffs cannot recover punitive damages for simple negligence, they may recover punitive damages upon a showing of "intentional or wanton and reckless conduct" on the part of defendants amounting to "a conscious disregard of the rights of others." [citation omitted] This is because the standard of liability necessary for the recovery of punitive

> damages is governed by admiralty law. Alabama law provides only the remedy which under *Yamaha* is now available to those wrongful death claimants in admiralty. (*In Re Amtrak "Sunset Ltd." Train Crash,* 121 F.3d at 1427-1428).

As to the personal injury claims, the court of appeals held that:

> Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as loss of society, loss of consortium or punitive damages except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing. . . .
>
> Today, we expressly extend our holding in *Lollie* to preclude the availability of punitive damages in personal injury actions brought under the general maritime law. (*In Re Amtrak "Sunset Ltd." Train Crash,* 121 F.3d at 1429)

REASONS FOR GRANTING THE PETITION

I. This Court should clarify *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), by expressly deciding that non-seafarers who are injured in state territorial waters have the same right to seek punitive damages under state law as the beneficiaries of nonseafarers who are killed in state territorial waters.

A. This case presents the opportunity to resolve an issue expressly reserved by this Court in footnote 14 in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 629, 133 L. Ed. 2d 578 (1996), *i.e.*, the apparent conflict between maritime wrongful death claims and maritime personal injury claims.

In footnote 14 in *Yamaha* this Court said *inter alia:*

> We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful death cases in which state law has held sway.[1]

In *Yamaha*[2] this Court held "that the damages available for the jet ski death of Natalie Calhoun are properly governed by state law." In that case plaintiffs had sought, *inter alia,* punitive damages under state law. But suppose that Natalie had a young brother who was riding as a passenger on the jet ski and he was injured in the collision that took Natalie's life. Is there any reason in law or policy why he should not also be permitted to recover punitive damages?

---

[1] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 629, 133 L. Ed. 2d 578, n. 14 (1996).

[2] *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 629.

There is no conflict as to the appropriateness of allowing state law on punitive damages to supplement both death and personal injury cases. a person injured within a state or its waters should be able to recover punitive damages provided by state law as supplemental to remedies available under the general maritime law.[3]

Footnote 14 raised some doubt as to the law applicable to such recovery suggesting that there might be a conflict between the applicability of state law in death cases and the applicability of state law in personal injury cases. No such disparity exists for two related reasons. First, state law may not take away remedies provided by the general maritime law. Secondly, in the absence of statute, state law may be applied in maritime injury and death cases as long as state law is consistent with or

---

[3] Maritime law consists of cases and statutes. The rules of maritime law that are enunciated in cases are referred to as the general maritime law. Most of the maritime law of the United States is general maritime law. Jurisdiction over maritime cases is shared with the states, which under the "saving to suitors" clause may provide remedies for cases that otherwise could be brought in federal court under Admiralty jurisdiction. Until Congress enacted the Jones Act, 46 U.S.C. app. § 688 (seaman's action for injury or death), Death on the High Seas Act (DOHSA), 46 U.S.C. app. § 761 (wrongful death remedy for all persons killed on the high seas), and later the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 (remedies for covered employees), all maritime personal injury and death law was contained in the general maritime law. Except to the extent that Congress has legislated, maritime personal injury and death law remains subject to the general maritime law.

supplemental to the general maritime law.[4] Footnote 14 contrasted two cases in which plaintiffs who sustained personal injuries in state waters, *Kermarec v. Compagnie General Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959), and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), with two cases involving deaths which occurred in state waters, *Hess v. United States*, 361 U.S. 314, 319, 80 S. Ct. 341, 345-346, 4 L. Ed. 2d 305 (1960), and *Tungus v. Skovgaard*, 358 U.S. 588, 592-594, 79 S. Ct. 503, 506-508, 3 L. Ed. 2d 524 (1959). In both personal injury cases the issue was the same, whether the general maritime rule of comparative negligence should trump a state rule that totally precluded a contributorily negligent plaintiff from recovering damages. In those cases, this Court opted for the application of the federal rule permitting recovery. Therein lies the difference between *Yamaha* and the instant case on the one hand and the personal injury cases cited in footnote 14. Traditionally maritime law has been "supplemented" by state law. In *Kermarec* and *Pope & Talbot* the effect of applying state law would have denied the respective plaintiffs a remedy otherwise available under maritime law. In this sense state law was not supplemental. It didn't add anything; it took away a remedy granted under the general maritime law.

By way of contrast, the federal courts prior to *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.C. 1772, 26 L. Ed. 2d 339 (1970), applied state wrongful death

---

[4] *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 624-628; *American Dredging Co. v. Miller*, 510 U.S. 443, 451-452, 114 S. Ct. 981, 987, 127 L. Ed. 2d 285 (1994); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-375, 79 S. Ct. 468, 480-482, 3 L. Ed. 2d 368 (1959).

remedies to deaths occurring in maritime waters because state law was supplemental to the general maritime law, as this Court held in *Hess* and *The Tungus, supra*. State wrongful death law added a remedy; it took nothing away. Prior to *Moragne* persons injured in territorial waters through the tortious conduct of others had a cause of action for damages under the general maritime law, but this remedy was unavailable where the victims died. Maritime law did not provide a remedy for wrongful death. In those circumstances federal and state courts entertained state death actions, thereby permitting state law to supplement a right which had been recognized in maritime law during the injured party's lifetime. In other words, state law provided a remedy for a maritime tort, and this is the crucial difference between the personal injury cases and the death cases referred to in footnote 14. Although in one class of cases this Court applied federal law and in the other state law, it did so because the state law applied in death cases was supplemental to federal rights and in the particular personal injury cases cited state law was detrimental to federal rights. Thus, in the instant case, as in *Yamaha*, state law supplements the general maritime law; it takes nothing away.[5] As the Court in *Yamaha* observed:

---

[5] Similarly, prior to the Supreme Court's recognition of a cause of action for products liability arising under the general maritime law in *East River Steamship Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295 (1986), lower federal courts, when faced with products liability claims arising under the general maritime law, frequently utilized state law as a basis for recovery. *See, e.g., Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, n.14 (5th Cir. 1984) (following Texas product liability law in boatowner's and passenger's death case); *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965) (applying Illinois

> Though we had generally refused to give effect to state laws regarded as inconsistent with the substance of federal maritime law, we concluded that extending state wrongful death statutes to fatal accidents in territorial waters was compatible with the substantive maritime policies "the subject is maritime and local in character and the specified modification or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."[6]

Earlier, in *Romero v. International Terminal Operating Co.*, this Court said:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death

---

law to a pleasure boat owner's personal injury claim arising in products liability); *Sevits v. McKierman-Terry Corp.*, 264 F.Supp. 810 (S.D.N.Y. 1966) (applying New York products liability law).

[6] *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 624, *citing Western Fuel Co. v. Garcia*, 257 U.S. 233, 242, 42 S. Ct. 89, 90, 66 L. Ed. 210 (1921).

> and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.[7]

B. The interests of federalism and the spirit of the "saving to suitors" clause (28 U.S.C. § 1333(1)) require that states be permitted to continue to play their historical role in providing "remedies" to supplement the general maritime law where maritime events implicate state interests, such as where nonseafarers are killed or injured within a state or in state waters.

Permitting state remedies, such a punitive damages in the instant case to supplement maritime remedies may not be mandated by the saving to suitors clause, but it certainly is in keeping with its spirit.[8] 28 U.S.C. § 1333 provides in pertinent part:

---

[7] 358 U.S. 354, 373-374, 79 S. Ct. 468, 480-481, 3 L. Ed. 2d 368 (1959), *quoted in American Dredging Co.*, 510 U.S. at 449, 114 S. Ct. at 987.

[8] In *Romero*, 358 U.S. at 374-375, 79 S. Ct. at 481-482, the Court stated:

> "In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors, in all cases all other remedies to which they are otherwise entitled.

In the instant case the injury was originally sustained on land when the train derailed. Injuries sustained on land are invariably the business of the states. Had it not been for the fortuity of a vessel in navigable waters striking

---

> Government has left much regulatory power in the States." Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.

(*Citing Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955)). *See also, American Dredging Co.*, 510 U.S. at 449, 114 S. Ct. at 987; *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1489-1491 (11th Cir. 1986) (holding that a state may create a direct action against an insurance company in a maritime case because there was no conflict with entrenched admiralty law and no strong admiralty interest affected by the state statute, including no strong concern for uniformity with respect thereto, contrasted with strong state interest in the regulation of insurance). *See also, Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-318 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988) (uniformity in the general maritime law is not an end in itself, otherwise state law would always be preempted).

the bridge, the case would have remained nothing more that a state tort.

Is there any reason in law or policy why all passengers should not be able to avail themselves of state remedies merely because this land based bridge was struck by a vessel? There is no federal statute that provides or denies any remedy for nonseafarers injured within a state or in state territorial waters. Therefore, there is no issue of preemption or conflict with legislation as in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). There is no decision of this Court which would deny a nonseafarer a state remedy under these circumstances. To the contrary, as will be discussed, *infra*, punitive or exemplary damages may be awarded under the general maritime law in appropriate circumstances. Plaintiffs in this case, like the late Natalie Calhoun, in *Yamaha*, are not employed in the maritime industry. In fact, the plaintiffs in this case were even further removed from maritime activity than Natalie Calhoun. She had been operating a vessel navigable waters. The plaintiffs in the instant case were passengers on a land based train on a journey between two places within the continental United States.

C. Fairness and common sense require that nonseafarers injured in state territorial waters be allowed to avail themselves of state supplemental remedies such as punitive damages.

There are strong similarities between *Yamaha* and the instant case in that both involve nonseafarer victims and the situs of both casualties is state territory. If anything, the land based situs in the instant case makes a stronger

case for state law. Treating nonseafarer injury cases differently from death cases would create an incongruity that defies law, logic and fairness. The district court in the instant case adopted an approach that, in effect, would have treated all plaintiffs fairly. It held that plaintiffs in the death cases and that plaintiffs in the personal injury actions could both seek punitive damages. The court of appeals held that the plaintiffs in the wrongful death actions may seek punitive damages but that such damages are not available to the personal injury plaintiffs. Yet except for the fact that some victims lived and some died there is absolutely nothing to distinguish one from the other.

II. This Court should remove the widespread confusion in the courts below by reiterating its long established rule that punitive damages are an appropriate element of damages in maritime tort cases including personal injury cases, except to the extent that Congress has indicated to the contrary.

A. It is essential that this Court resolve the conflict that has manifested itself between the Court's rationale in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and its rationale in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 629, 133 L. Ed. 2d 578 (1996).

Miles (a maritime seaman death case) has been understood by most lower federal courts as precluding recovery in maritime personal injury and death cases for all nonpecuniary damages (save for pain and suffering) regardless of the status of the plaintiff, regardless of the status of the defendant and regardless of locale and circumstances

surrounding the casualty.[9] *Yamaha* (a maritime nonseaman death case) allows resort to state remedies and, by implication, recovery of nonpecuniary damages such as punitive damages, loss of consortium, etc., where permitted by state law.[10] Only this Court can resolve this conflict by establishing that its decision in *Miles* is not the functional equivalent of a "Comprehensive Tort Reform Act."[11] It can do so by reversing the court below and by holding that except where Congress has indicated to the contrary, punitive damages may be an appropriate item of damages in maritime personal injury cases under the general maritime law and under state law as supplemental to the general maritime law.

In *Miles*,[12] this Court concluded *inter alia:* "We hold that there is a general maritime law cause of action for the wrongful death of a seaman, but that damages recoverable in such action do not include loss of society." In reaching this conclusion the Court earlier had observed:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime law claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more

---

[9] *See, e.g.*, Appendix D and Robert Force, *The Curse of* Miles v. Apex Marine Corp.: *The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA.L.REV. 745, 765-66 (1995).

[10] *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 628.

[11] *See, e.g.*, cases cited in Appendix D.

[12] *Miles*, 498 U.S. at 37, 111 S. Ct. at 328.

> expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in case of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.[13]

Later in regard to the second issue in the case, the Court said:

> Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act. . . . [14]

In *Yamaha*, this Court subsequently said:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided. . . . (citations omitted) But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters.[15]

Miles addressed the relationship between damages recoverable for the death of a seaman in an unseaworthiness action under the general maritime law and damages recoverable for the death of a seaman under the Jones Act. This Court concluded that it would be inappropriate to confer a wider range of damages under the former than Congress has bestowed under the latter. The reference to "uniformity" in *Miles* was explained subsequently in *Yamaha* as being made in the context that Congress had already defined the parameters of recovery in seaman

---

[13] *Miles*, 498 U.S. at 32, 111 S. Ct. at 325.

[14] *Miles*, 498 U.S. at 36, 111 S. Ct. at 327-328.

[15] *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 628.

death cases. In *Miles* this Court did not discuss the appropriate rule of damages to be used in any other cases such as those involving nonseafarers. And yet in the instant case the court below stated:

> In *Lollie v. Brown*, we looked disfavorably on the availability of nonpecuniary damages under the general maritime law. Specifically we held that "neither the Jones Act nor general maritime law authorizes the recovery for loss of society or consortium in personal injury cases." (citation omitted)
>
> Today, we expressly extend our holding in *Lollie* to preclude the availability of punitive damages in personal injury cases brought under the general maritime law. Accordingly we vacate the district court's ruling that the personal injury plaintiffs in this action are entitled to pursue such nonpecuniary damages.[16]

The Court below extended its prior holding in *Lollie*, denying loss of consortium in a seaman's case, to deny punitive damages to the nonseafarer plaintiffs in the instant case. *Lollie*[17] is a one paragraph *per curiam* opinion which adopted the reasoning of two Fifth Circuit cases.[18] Both of those cases are based on *Miles*.[19] Thus, although not articulated in the opinion below, *Miles* was the basis for denying plaintiffs the right to seek punitive damages.

---

[16] *In Re Amtrak "Sunset Ltd." Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997).

[17] *Lollie v. Brown Marine Service, Inc.*, 995 F.2d 1565 (11th Cir. 1993).

[18] *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 131-32 (5th Cir.), *cert. denied*, 506 U.S. 865, 113 S. Ct. 190, 121 L. Ed. 2d 134 (1992).

[19] *See Michel*, 957 F.2d at 191 and *Murray*, 958 F.2d at 131-32.

As indicated by the court below, since *Miles*, the federal courts look "disfavorably" on the recovery of nonpecuniary damages under the general maritime law especially in personal injury cases. Yet these courts have done more than look disfavorably, they often have denied the right to recover nonpecuniary damages such as punitive damages.[20] If this Court does not establish that its decision in *Miles* was intended to apply to seamen and is not to be applied as though it is the functional equivalent of a "Comprehensive Tort Reform Act," then the lower federal courts themselves will have brought about that result in deference to *Miles*.

Prior to *Miles*, federal courts sitting in admiralty frequently permitted recovery of punitive damages under the general maritime law, recognizing that "[i]t is inconsistent with federal maritime law to prohibit damages . . . when there is no explicit statutory or federal common law prohibition on such damages." *Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192, 195 (S.D. W. Va. 1991). *See, e.g., P&E Boat Rentals, Inc. et al. v. Stoufflet*, 872 F.2d 642 (5th Cir. 1989) (punitive damages are recoverable under the general maritime law in nonseafarer's personal injury action); *Carlissa Churchill v. F/V Fjord*, 892 F.2d 762 (9th Cir. 1987) (in seaman's personal injury and death action, "[p]unitive damages are available under the general maritime law . . . for conduct which manifests 'reckless or callous disregard' for the rights of others . . . "); *Dunn v. Penrod Drilling Company*, 660 F. Supp. 757 (S.D. Tex. 1987) (nonpecuniary losses such as punitive damages are recoverable under the general maritime law in nonseafarer's personal injury

---

[20] *See, e.g.*, cases cited in Appendix D.

action.); *Cameron Boat Rentals, Inc.*, 683 F. Supp. 577 (W.D. La. 1988) (punitive damages are recoverable in actions under the general maritime law involving "willful and wanton misconduct . . . " in seaman's personal injury action).

Since *Miles*, however, many courts have repudiated this position and have disallowed punitive damages not only in actions where such damages are statutorily prohibited but also in actions under the general maritime law.[21] In *Guevara*, the Fifth Circuit overruled its precedent with respect to punitive damages in maintenance and cure cases, but also in very strong and very clear *dictum* indicated that its prior decisions allowing for the recovery for punitive damages for willful and wanton conduct that resulted in personal injury to a seaman were now to be overruled as well: "Taking the analysis one step further, it should be clear that actions under the general maritime law for personal injury are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – *i.e.*, the Jones Act."[22]

Plaintiffs in the instant case are not seamen or maritime workers. In *Yamaha* terminology they are "nonseafarers".[23] Relief is not sought under federal statute

---

[21] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1513, 1995 A.M.C. 2409, 2435 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 706 (1996); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505, 1995 A.M.C. 2022, 2036 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 708 (1996).

[22] *Guevara*, 59 F.3d at 1506, 1995 A.M.C. at 2423-2424.

[23] A nonseafarer, such as Natalie Calhoun, is presumably someone falling under the admiralty jurisdiction of the federal courts, but is "not a seaman, longshore worker, or person

and as the Court in *Yamaha* found that there was no federal statute applicable to death cases, there is no federal statute applicable to personal injury in state waters. Plaintiffs seek recovery for personal injuries not wrongful death. How did the court below reach its conclusion that nonpecuniary damages are not available where nonseafarers are injured within a state or its waters? If the answer to the question was simply that the court below was in error, it would hardly be appropriate to request this Court to correct it. But the heart of the matter is that in maritime personal injury cases virtually every court of appeals[24] that has addressed the issue, and many of the district courts[25] as well, have treated this Court's Opinion in *Miles* as the functional equivalent of a "Comprehensive Tort Reform Act" notwithstanding that Congress has yet to enact one. One court after another has denied all plaintiffs in all circumstances the right to recover any nonpecuniary damages including punitive damages.[26] In

---

otherwise engaged in a maritime trade." *Yamaha*, 516 U.S. at ___, 116 S. Ct. at 622.

[24] *See, e.g.*, cases cited in Appendix D, Part I.

[25] *See, e.g.*, cases cited in Appendix D, Part II.

[26] The circuit courts have taken upon themselves a "duty" to apply the principles of *Miles* beyond its facts to deny nonpecuniary damages in all admiralty cases irrespective of whether the plaintiff was a seafarer or nonseafarer, or whether the claim involved personal injury or wrongful death. *See, e.g., Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (widow's claim arising from seaman's death); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (seaman's injury claim); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1994 A.M.C. 2642 (9th Cir. 1994) (cruise ship passenger's loss of consortium claims arising from personal injury); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1995 A.M.C. 2022 (9th Cir. 1995) (seaman's punitive

virtually none of these cases has there been any consideration of the merits of the particular damages sought under the circumstances of the case.

B. Except to the extent that Congress has indicated to the contrary, punitive or exemplary damages continue to be recoverable in tort actions under the general maritime law and may be recovered where appropriate in personal injury cases.

A reaffirmation of this rule is required[27] because as stated above virtually every court of appeals and many district courts since *Miles* have denied punitive damages in maritime personal injury cases.[28] The necessity for action is not prompted merely by the decision in the court below, but because this limitation on the general rule of punitive damages is widespread. This Court has recognized that right to recover punitive damages in maritime

---

damages claim); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1995 A.M.C. 2409 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 706 (1996) (seaman's punitive damages claim for willful and wanton failure of shipowner to pay maintenance and cure); *Adler v. Royal Cruise Line, Ltd.*, 1996 WL 438799, 1996 A.M.C. 1349 (N.D. Cal. 1996) (cruise ship passenger's loss of consortium claims arising from personal injury); *see also, Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 510 U.S. 1114, 114 S. Ct. 1060 (1994) (relying partially on *Miles* and holding that a non-dependent parent of a child killed in a jet ski accident could not recover nonpecuniary damages).

[27] This case does not require this Court to resolve doubts as to the degree of egregiousness which would make the award of punitive damages appropriate in maritime personal injury cases.

[28] *See, e.g.*, cases cited in Appendix D.

tort cases.[29] It has not held that punitive damages may never be recovered in personal injury cases no matter how egregious the circumstances. True, it has addressed the matter infrequently and has never awarded punitive damages in a maritime personal injury case. Nevertheless, recovery of punitive damages in tort cases was part of federal common law that held great sway before *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). There this Court acknowledged that the "general law" included "the right to exemplary or punitive damages."[30] Several cases in this Court in that era discussed the availability of punitive damages in non-maritime

---

[29] *The Amiable Nancy*, 16 U.S. 546, 558, 4 L. Ed. 456 (1918), where this Court stated:

> And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.

In the lower federal courts punitive damages were frequently discussed in maritime cases, but not often awarded. *Hoeffner v. National S.S. Co.*, 1 F.2d 844 (9th Cir. 1924); *The Ludlow*, 280 F. 162 (N.D. Fla. 1922); *The General Rucker*, 35 F. 152, 158 (W.D. Tenn. 1888) (where the court acknowledged that punitive damages may be awarded to "redress outrageous personal indignities"); *The D.S. Gregory and the George Washington*, 7 Fed. Cas. 1122 (S.D.N.Y. 1868). In these cases the right to recover punitive damages under the general maritime law was acknowledged but in each plaintiff failed to prove a factual basis for recovery. *Compare Ragland v. Norfolk and Washington (D.C.) Steamboat Co.*, 163 F. 376 (E.D. Va. 1908) (punitive damages were allowed against the wrongdoer).

[30] *Erie R.R. v. Tompkins*, 304 U.S. 64, 75, 58 S. Ct. 817, 821, 82 L. Ed. 1188 (1938).

injury cases,[31] including injuries to railroad passengers and employees.[32] No decision of this Court has cast any doubt that the general rule that punitive damages remains applicable in maritime tort cases, save only the limitation that such damages may not be awarded in cases where Congress has spoken to the contrary.

Although today the scope of federal common law may be small, the general maritime law remains as its preeminent component.[33] That is true not only as to many aspects of personal injury law, but with regard to the law of collision liability and damages, aspects of marine insurance, towage, etc. Thus, the application of judge made law of punitive damages is appropriate and historically based. *Erie* did not affect maritime law. Furthermore, this Court continues to recognize that punitive damages remain part of federal common law.[34]

---

[31] *Day v. Woodworth*, 54 U.S. 363, 371, 14 L. Ed. 181 (1851).

[32] *Lake Shore and M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893); *Miller v. Baltimore & O.R. Co.*, 17 F. Cas. 304 (Cir. Ct. S.D. Ohio 1876).

[33] Although Justice Scalia has written in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 12, PRINCETON UNIVERSITY PRESS (1997), "in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law[ ]," he has also observed "there is an established and continuing tradition of federal common lawmaking in admiralty. . . . " *American Dredging Co.*, 510 U.S. at 455, 114 S. Ct. at 989.

[34] While the scope of federal common law has been narrowed since *Erie*, the viability of punitive damages has survived within the federal common law except where explicitly displaced by a Congressional statute. As this Court has previously noted, "[p]unitive damages are a "peculiar remedial mechanism normally available in the federal courts." *Carlson v. Green*, 466 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15

C. Denial of punitive damages in personal injury actions when they are available in death actions and in property loss or damage cases has no rational basis in law or policy and, in that respect, is constitutionally troubling.

The due process provision in the Fifth Amendment has been interpreted as embracing the concept of equal protection, that is the right to be free from arbitrary governmental discrimination.[35] Rules of law, whether legislative or judicial in origin, which provide different measures of damages in similar situations must be based

---

(1980) (punitive damages permitted in *Bivens* suit and § 1983 actions). *See also, Smith v. Wade*, 461 U.S. 30, 34, 103 S. Ct. 1625, 1629 (1983) (punitive damages permitted in § 1983 case: "Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court." (citations omitted)); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 13, 111 S. Ct. 1032, 1041 (1991) (permitting punitive damages in diversity case brought under the law of Alabama); *Int'l Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979) (punitive damages in labor relations case).

Federal courts outside admiralty are consistently careful to distinguish between claims where punitive damages are statutorily prohibited such as claims falling under the Federal Torts Claims Act, and those where punitive damages are not statutorily barred, and therefore permissible. *See, e.g., Carlson*, 466 U.S. at 21, 100 S. Ct. at 147. Likewise, simply because punitive damages may be unavailable under statutory schemes such as the Jones Act or DOHSA, this prohibition should not displace the existing federal common law of punitive damages for nonseafarers who do not fall under any statutory scheme absent Congressional direction to the contrary.

[35] *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1953).

on some rational basis.[36] There is no basis in law or policy for the Eleventh Circuit to have denied personal injury plaintiffs the right to seek punitive damages when such right has been extended to the survivors of persons killed in the very same casualty.

Courts usually approach the rational basis inquiry with great deference, but that is because of regard for the duly elected representatives of the people.[37] This deference reflects respect for the role of legislatures in formulating policy and choosing between competing alternatives.[38] It also respects the fact finding capabilities of the legislative branch. Such considerations are simply not present when the issue is one of federal common law or the appropriateness of the use of state law as a supplement to federal common law. This Court should not defer to a rule of federal common law formulated by a lower court.

Punitive damages are imposed on defendants as punishment when they have acted in a particularly egregious manner.[39] Although the extent of injury could be a relevant factor, it cannot be dispositive especially in light of the fact that the rule permitting punitive damages was not formulated as an adjunct to wrongful death actions.[40] Denial of punitive damages to personal injury plaintiffs would have the anomalous result of treating differently a

---

[36] *Cf., Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

[37] *Schweiker v. Wilson,* 450 U.S. 221, 230, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981).

[38] *Id.*

[39] *The Amiable Nancy,* 16 U.S. 546, 558, 4 L. Ed. 456 (1918).

[40] *Id.*

husband and wife riding side by side on the same train merely because one died and the other lived. In these tragic accidents who lives and who dies is often fortuitous. From a constitutional perspective the inequality is compounded by the fact that punitive damages are available in maritime torts for loss of or damage to property.[41] Thus under the decision of the court of appeals, the opportunity to recover punitive damages in maritime tort cases is denied to only one class of plaintiff – those who suffer personal injury. This simply makes no sense and the court below provides no justification, rational or otherwise.

III. The goal of uniformity will be better served if punitive damages remain part of the general maritime law and available in personal injury cases. The goal of uniformity also will be better served if state punitive damage remedies are equally available to nonseafarers injured in state territorial waters as they are in wrongful death actions.

Too often the uniformity issue in maritime personal injury and death cases is discussed in the context of the different classes of plaintiffs.[42] That approach is fraught with problems because in maritime personal injury and death law, the status of the plaintiff and the status of the defendant have always been important factors in defining

---

[41] *Id.; CEH v. F/V Seafarer*, 70 F.3d 694, 1996 A.M.C. 467 (1st Cir. 1990).

[42] *See, e.g., Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1994 A.M.C. 2642 (9th Cir. 1994); *Adler v. Royal Cruise Line, Ltd.*, 1996 WL 438799, 1996 A.M.C. 1349 (N.D. Cal. 1996).

the rights and liabilities of the parties.[43] Except where Congress has said otherwise[44] there is no reason for persons, *especially nonseafarers,* injured in navigable waters to have less rights than persons injured on the land in similar circumstances. Under appropriate circumstances, punitive damages are available in personal injury cases in virtually every state.[45] This is not surprising because punitive damages in federal and state law share a common heritage. Prior to *Erie,* it was not uncommon for federal and state courts to regard decisions from other jurisdictions as persuasive authority. It was not uncommon for federal courts to cite to state decisions.[46]

Thus, the continued availability of punitive damages in maritime personal injury cases retains an important

---

[43] Robert Force, *Post*-Calhoun *Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?,* 21 TUL. MAR. L.J. 7, 11 (1996).

[44] *E.g.,* Death on the High Seas Act, 46 U.S.C. app. § 762.

[45] Punitive damages are pervasive among the states. Currently, virtually every state permits the recovery of punitive damages for shore-based personal injury torts. Forty-two states permit punitive damages without reservation; four permit punitive damages under certain statutorily-enumerated circumstances; and only four disallow punitive damages. *See, e.g.,* 2 SCHLUETER & REDDEN, PUNITIVE DAMAGES (3d ed. 1995) at 343-462; RICHARD L. BLATT, ROBERT W. HAMMESFAHR AND LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (1996 Pocket Part).

[46] One of the most comprehensive discussions of punitive damages is found in *Lake Shore and M.S. Ry. Co. v. Prentice,* 147 U.S. at 107-117, 13 S. Ct. at 262-266, 37 L. Ed. 97 (1893). In this case involving a tort committed against a railroad passenger, Justice Gray relied on *The Amiable Nancy, supra,* an admiralty case, and cited with approval numerous state court decisions.

likeness to state land based law. This is particularly significant with the application of federal maritime law to a whole range of cases in which states have a particular interest: recreational boating accidents,[47] personal watercraft accidents,[48] passenger cruises including day cruises,[49] etc. Some coherence between maritime law and state law helps de-emphasize some of the technical distinctions underlying admiralty tort jurisdiction and may be a disincentive to forum shopping. This is particularly important in light of the fact that maritime personal

---

[47] In 1996, over 11,000 recreational boats were involved in 8,005 accidents in the United States. These accidents resulted in 709 fatalities and 4,427 injuries. In 1995, over 11,000 recreational boats were involved in 7,863 accidents in the United States. These accidents resulted in 830 fatalities and 4,064 injuries. The United States Coast Guard, Office of Boating Safety, tp://www.uscgboating.org/stats.html (last visited November 22, 1997).

[48] Injuries arising from personal watercraft accidents have increased dramatically in the last decade. In 1990, only 2,860 injuries needing hospital treatment were reported; however, by 1995 injuries increased to 12,000. Concurrently the number of personal watercraft owned also greatly increased from 241,500 in 1990 to approximately 1.1 million in 1997. The United States Coast Guard, Office of Boating Safety, tp://www.uscgboating.org/stats.html (last visited November 22, 1997), *citing*, The Center for Disease Control & Prevention, Atlanta, Georgia.

[49] During 1996, approximately 4.6 million passengers embarked on cruises from U.S. ports, representing only 15% of the U.S.-based cruise market's potential. Industry analysts estimate that by the year 2000, the annual number of cruise passengers is projected to increase to 7 million. Prepared Testimony of Frank Pequex before the Senate Committee on Commerce, Science and Transportation, October 21, 1997, as reported in the Federal News Service. *See also*, Carolyn Brown, *Cruise Report*, The Washington Post, October 5, 1997, at E01.

injury cases may be entertained in state courts under the saving to suitors clause.

Allowing nonseafarers who have been injured within a state or its waters to seek a state punitive damage remedy as this Court affirmed in *Yamaha* promotes another type of uniformity in maritime torts. This approach treats all nonseafarers who sustain injury within a state or its waters the same regardless of whether their injuries result in death or not. It also narrows the gap between federal and state law by avoiding the incongruity of providing state punitive damage remedies in land based torts and maritime death cases but not in maritime personal injury cases.

CONCLUSION

The present case involves much more than whether passengers injured in a train derailment and subjected to maritime law under the Admiralty Extension Act because of the bizarre manner in which this casualty occurred may recover punitive damages. The resolution of the issue in this case will determine whether, as a matter of law and regardless of the circumstances, punitive damages are simply never recoverable in a maritime personal injury case, as the court below held. For example, resolution of the issue before this Court will determine whether or not punitive damages may ever be recovered by passengers on a cruise ship who are injured in state territorial waters as a result of wanton disregard for their safety. It will determine whether people injured by drunken operators of a pleasure boat in state waters will be denied an opportunity to prove that they are entitled to recover punitive damages.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN D. HENINGER
Counsel of Record

OF COUNSEL:

STEPHEN D. HENINGER
S. GREG BURGE
HENINGER, BURGE & VARGO, LLP
1500 Financial Center
Birmingham, Alabama 35203
205/322-5153
205/322-6706 (Fax)

JOSEPH M. BROWN, JR.
DAVID G. WIRTES, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN, LLC
1601 Dauphin Street
Mobile, Alabama 36604
334/471-6191
334/479-1031 (Fax)

JAMES J. THOMPSON, JR.
BRUCE M. MCKEE
HARE, WYNN, NEWELL & NEWTON
290 North 21st Street
Birmingham, Alabama 35203
205/328-5330
205/324-2165

APPENDIX A

OPINION OF THE ELEVENTH CIRCUIT

SEPTEMBER 11, 1997

UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

In re AMTRACK "SUNSET LIMITED" TRAIN CRASH IN BAYOU CANOT, ALABAMA, ON SEPTEMBER 22, 1993.

James ALTOSINO, Marie V. Altosino, John L. Anderson, Alice Anello, Joseph Anello, et al., Plaintiffs-Appellees,

v.

WARRIOR & GULF NAVIGATION COMPANY, Willie C. Odom, Andrew Stabler, CSX Transportation, Inc. and National Railroad Passenger Corp. d.b.a. Amtrak, Defendants-Appellants.

No. 96-6833.

United States Court of Appeals,
Eleventh Circuit.

Sept. 11, 1997.

Appeals from the United States District Court for the Southern District of Alabama.

Before BARKETT, Circuit Judge, HILL, Senior Circuit Judge, and HOWARD*, Senior District Judge.

---

* Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

HOWARD, Senior District Judge:

In this admiralty action, which was consolidated by the Judicial Panel on Multidistrict Litigation, Appellants Warrior & Gulf Navigation Company ("WGN"), Willie C. Odom, Andrew Stabler, CSX Transportation, Inc. ("CSX"), and National Railroad Passenger Corp. ("Amtrak"), appeal from an adverse ruling by the district court that the Alabama wrongful death statute, Ala.Code § 6-5-410 (1993),[1] applied to all aspects of the wrongful death

---

[1] Section 6-5-410 of the Alabama Code provides in pertinent part:

> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.
>
> (b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission, or negligence.
>
> (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.
>
> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

Ala.Code § 6-5-410 (1993).

claims in this action under the holding of *Yamaha Motor Corp., U.S.A. v. Calhoun*, ___ U.S. ___, ___, 116 S.Ct. 619, 622, 133 L.Ed.2d 578 (1996). Appellants also appeal from the district court's ruling that the plaintiffs in the personal injury cases ("personal injury plaintiffs") may recover punitive damages and damages for loss of society and consortium. We vacate the decision of the district court on both grounds and remand this action for further consideration.

I. Background

The incident giving rise to this action occurred in the early morning hours of September 22, 1993, in state territorial waters near the Port of Mobile, Alabama. At approximately 2:45 that morning, a commercial towing vessel named the M/V Mauvilla ("Mauvilla") was traveling north on the Mobile River pushing a tow of six loaded barges toward a destination some three hundred and fifty miles upriver. The vessel, owned and operated by WGN, was carrying a crew under the command of a captain and pilot.

Early in the voyage, the Mauvilla was enveloped by a heavy fog that had settled on the river. The pilot of the vessel, with his visibility of the waterway compromised, decided to secure the Mauvilla and wait for the fog to abate. However, while attempting to secure the Mauvilla to the river bank, the pilot allowed the vessel to veer into the mouth of Big Bayou Canot, a tributary of the Mobile River.

Unaware of what had transpired, and under the mistaken belief that he was still navigating in the Mobile

River, the pilot continued to search for a place to secure the Mauvilla and its tow. While this task was being undertaken, an object appeared on the Mauvilla's radar screen which the pilot believed to be another vessel to which he could secure his vessel. That object was in fact a railroad bridge, owned and maintained by CSX, that crossed Big Bayou Canot.

As the pilot steered the Mauvilla toward the object, the tow struck a bridge support causing a portion of the railroad track to become laterally misaligned. Soon after, a passenger train, operated by Amtrak, derailed while attempting to traverse the damaged section of rail. Three locomotives, two passenger coaches, a crew dormitory car, and a baggage car, tumbled into the bayou, resulting in the death of forty seven persons on the train, numerous personal injuries, and extensive property damage to the train and bridge.

The crash precipitated the filing of over one hundred personal injury and wrongful death suits against WGN, the pilot and captain of the Mauvilla, CSX, and Amtrak. The Judicial Panel on Multidistrict Litigation consolidated these actions in the United States District Court for the Southern District of Alabama for all pretrial proceedings.

Because this action arose from an accident on navigable waters that involved both land-based and marine-based activity, the district court proceeded to determine as an initial matter the applicable law and the recoverable damages. By written Order of June 26, 1996, the district court entered its rulings with respect to these issues.

The trial court found that, while admiralty jurisdiction existed over this action, state law was to govern all aspects of the wrongful death claims. The district court also held that the personal injury claims in this action would be subject to the general maritime law which, the district court found, allowed the personal injury plaintiffs to pursue nonpecuniary damages that included loss of consortium, loss of society, and punitive damages. As to the claims asserted by CSX and Amtrak for property damage, the court ruled that these claims would be governed by admiralty law but would be limited to compensatory damages only.[2]

By written Order of July 15, 1996, the district court amended its previous order and certified these rulings for immediate interlocutory appeal. This Court granted interlocutory review.

II. Discussion

A.

The main issue in this appeal is whether the district court erred in finding that Alabama's wrongful death statute governs the wrongful death claims asserted in this action. It is appellants' contention that the district court's

---

[2] On appeal, CSX and Amtrak argue that if the district court was correct in finding nonpecuniary punitive damages to be available for the personal injury claims under the general maritime law, then the court necessarily erred in limiting their property damage claims to compensatory damages. As we hold that nonpecuniary punitive damages are unavailable for the personal injury claims under the general maritime law, we find this argument moot.

ruling cannot stand because the Alabama wrongful death act conflicts with substantive admiralty law such that state law cannot be used by the plaintiffs as a source of relief under *Yamaha Motor Corp. v. Calhoun*, ___ U.S. ___, ___, 116 S.Ct. 619, 622, 133 L.Ed.2d 578 (1996).

When this argument was raised below, the district court correctly observed that the Alabama wrongful death statute conflicts with federal maritime law in two significant respects. First, the general maritime law does not allow for the recovery of punitive damages except on a showing of willful and wanton misconduct in claims not relevant to this analysis. See discussion infra. On the other hand, the Alabama wrongful death statute allows for the recovery of punitive damages only, *King v. National Spa & Pool Inst., Inc.*, 607 So.2d 1241, 1246 (Ala.1992) (citing *Barnes v. Oswalt*, 579 So.2d 1319 (Ala.1991)), and permits the recovery of these damages on a showing of simple negligence, Ala.Code 6-5-391(a) (1993) (damages recoverable for "wrongful act, omission, *or negligence*" causing death) (emphasis added).

Second, federal maritime law requires that individual fault among tortfeasors be apportioned in collision and allision cases. *See, e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715-16, 44 L.Ed.2d 251 (1975); *Florida E. Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060, 1063-64 (5th Cir.1981). Under Alabama law, however, apportionment of damages among joint tortfeasors is strictly forbidden. *See, e.g., Campbell v. Williams*, 638 So.2d 804, 809-10 (Ala.), *cert. denied*, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994). It also prohibits actions for contribution. *See, e.g., Consolidated Pipe & Supply Co. v.*

Stockham Valves & Fittings, Inc., 365 So.2d 968, 970 (Ala.1978).

Despite the presence of these conflicts, the district court concluded that the Alabama wrongful death statute applied to the wrongful death claims in this action. The district court reasoned that:

> Certainly, when ruling, the [*Yamaha*] Court clearly understood that the application of state wrongful death schemes to deaths occurring within territorial waters would introduce myriad inconsistencies into the law of maritime wrongful death. Specifically, the Court understood that there would be wide variations in the damages recoverable under those schemes.

Embodied within the district court's reasoning is the assumption that *Yamaha*, by allowing state law remedies in that case, implicitly accepted a necessary byproduct of its holding: that state wrongful death schemes would conflict with the general maritime law which, ultimately, must yield to state interests.[3] The district court's interpretation of *Yamaha* is mistaken.

---

[3] Citing *The Tungus v. Skovgaard*, 358 U.S. 588, 592-93, 79 S.Ct. 503, 506-07, 3 L.Ed.2d 524 (1959) and *Hess v. United States*, 361 U.S. 314, 320, 80 S.Ct. 341, 346, 4 L.Ed.2d 305 (1960), the district court found that the Alabama wrongful death statute would have to be applied as a whole, including the provisions which conflicted with admiralty law, as trial courts could not "pick and choose some portions of a state scheme and discard others."

B.

In *Yamaha*, the Supreme Court held that its holding in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which created a wrongful death action under the general maritime law, did not provide the exclusive remedies in cases involving the deaths of non-seamen in state territorial waters. *Yamaha*, ___ U.S. at ___, 116 S.Ct. at 622. As explained by the *Yamaha* Court, *Moragne* represented an "extension of relief," driven by a "humane and liberal" purpose, that did not foreclose the availability of state law remedies in such cases. *Yamaha*, ___ U.S. at ___, 116 S.Ct. at 627 ("*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalled that it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it by established and inflexible rules") (quotations and citations omitted).

To be sure, in reaching its decision the *Yamaha* Court was aware that a dual system of recovery would introduce into the general purview of admiralty law variations in damage awards and recoveries. Indeed, the Court expressly observed in *Yamaha* that "[v]ariations of this sort had long been deemed compatible with federal maritime interests." *Id.* at ___, 116 S.Ct. at 626 (citing *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921)).

However, it is equally certain that the *Yamaha* Court, while aware that its decision would create, to some extent, unavoidable conflict between state law and federal maritime law, did not intend to wholly sacrifice long-

standing admiralty principles at the altar of states' rights. To the contrary, in *Yamaha* the Court confined its holding "to the modest question whether it was *Moragne's design to terminate recourse to state remedies*," *id.* at ___ n. 8, 116 S.Ct. at 626 n. 8, but in answering that question in the negative, repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies," *id.* at ___n. 13, 116 S.Ct. at 628 n. 13 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74, 79 S.Ct. 468, 480-81, 3 L.Ed.2d 368 (1959)), such that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at ___n. 8, 116 S.Ct. at 626 n. 8. (quoting *Romero*, 358 U.S. at 373, 79 S.Ct. at 480-81).

Thus, it is evident in *Yamaha* that the Court, while intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters), was not concerned with overruling bedrock admiralty principles recognized in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917), where the Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Indeed, since the birth of the *Jensen* doctrine in the early part of this century, the goals of uniformity and harmony in admiralty have survived to the present. *Yamaha*, by emphasizing these principles yet again, has affirmed their continuing vitality.

Consequently, it would be wrong to assume, as it appears the district court did in this case, that the holding in *Yamaha* embodies an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters. It is plain from the language in *Yamaha* that more is at issue in these situations; conflicts of this type must be resolved with a healthy regard for the needs of a uniform maritime law.

Of course, this balancing act – allowing state law remedies while being careful not to trample the general maritime law – is, by its nature, made more or less difficult by the particular facts of a case. As observed by the United States Court of Appeals for the Third Circuit in *Yamaha*, "determining whether federal maritime law conflicts with and thus displaces state law has proven to be extremely tricky. . . . " *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 628 (3d Cir.1994). "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence. . . . " *Yamaha*, ___ U.S. at ___n. 8, 116 S.Ct. at 626 n. 8 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S.Ct. 981, 987, 127 L.Ed.2d 285 (1994)).

Nowhere is the difficulty in drawing this line more evident than in the present case. Here, we have before us a state statute that is unique; the Alabama wrongful death statute is the only one of all the fifty states that provides for punitive damages only, *see Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1262 (Ala.1986) (Maddox, J., concurring) (observing that Alabama is the only state in which wrongful death damages are purely punitive), and allows for the recovery of punitive damages on a showing

of mere negligence, *see* discussion *supra*. Furthermore, the particular facts of this case implicate a variety of federal maritime interests that simply were not present in *Yamaha* and, as a result, do not lend themselves to direct analysis under that case.[4] Thus, we must steer to sources other than *Yamaha* for guidance in resolving the present conflict between the Alabama wrongful death statute and the general maritime law. That search necessarily takes us to *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir.1986).

In *Steelmet*, this Court summarized the task that we must undertake in determining whether to apply state law in this case. There, we explained that:

> One must identify the state law involved and determine whether there is an admiralty principle with which the state law conflicts. . . . If there is an admiralty-state law conflict, the comparative interests must be considered – they may be such that admiralty shall prevail . . . or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect. . . .

---

[4] In *Yamaha*, the Court was asked to examine the potential application of the wrongful death and survival statutes of Pennsylvania and Puerto Rico. In doing so the Court never addressed whether these statutes were in conflict with any characteristic features of the general maritime law. The absence of conflicts analysis in Yamaha most likely is due to the fact that the Pennsylvania and Puerto Rico statutes were primarily remedial in nature. There was nothing in *Yamaha* from which it may be inferred that the application of these statutes threatened federal maritime principles or policies.

Id. at 1488 (citations omitted); *accord Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1530 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).[5] Applying *Steelmet* to the present action, we must balance Alabama's interests in having its wrongful death statute apply against the federal maritime law principles of uniformity and harmony.

It goes without saying that the State of Alabama has a sovereign interest in activities that occur within its territorial waters. *See Brockington*, 903 F.2d at 1530 (state interests include the interest in being permitted to regulate independently matters of local concern without interference by the federal government). Moreover, Alabama undoubtedly is interested in protecting its citizens and providing for those who have been injured by tortious acts committed within its borders. *See Yamaha*, 40 F.3d at 644 (state interests include policing territorial waterways and protecting citizens through tort systems). However, as significant as Alabama's interests may be, the federal maritime concerns that exist in this case tip the balance in favor of displacing state law insofar as the claims for wrongful death under the Alabama Wrongful Death Act are based upon simple negligence.

---

[5] The comparative interests analysis set forth in *Steelmet* is by no means novel. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir.1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988); *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir.1975).

To begin with, the Alabama wrongful death statute conflicts with two fundamental admiralty law principles that bear directly on the rights and liabilities of the parties: (1) apportionment of damages for joint tortfeasors, and (2) the applicable standard of liability for the recovery of punitive damages. *See* discussion *supra; cf. American Dredging*, 510 U.S. at 452-53, 114 S.Ct. at 987-88 (absence of conflict between state law and *substantive* maritime law or interest); *Brockington*, 903 F.2d at 1530-33 (same); *Steelmet*, 779 F.2d at 1490-91 (same). That substantive admiralty law rights are being threatened in this case is a critical factor in considering the relative weight of federal maritime interests. *See American Dredging*, 510 U.S. at 452-53, 114 S.Ct. at 987-88 (using distinction between substantive and procedural rights in deciding applicability of state law); *see also Pope & Talbot v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204-05, 98 L.Ed. 143 (1953) (admiralty's comparative negligence rule barred application of state contributory negligence rule); Kossick, 365 U.S. at 742, 81 S.Ct. at 893 (federal maritime rule validating oral contracts precluded application of state Statute of Frauds); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49, 63 S.Ct. 246, 252-53, 87 L.Ed. 239 (1942) (federal maritime rule allocating burden of proof displaced conflicting state rule). Indeed, the Supreme Court has warned that states "may not deprive a person of any substantial admiralty rights as defined . . . by interpretative decisions of this Court." *Pope*, 346 U.S. at 410, 74 S.Ct. at 205. Thus, in a case like the present, where substantive admiralty principles are placed at risk by the potential application of state law, there is "no leeway for variation or supplementation by state law," *Yamaha*, ___ U.S. at ___,

116 S.Ct. at 626 (citing some above cases), insofar as the claims for wrongful death under the Alabama Wrongful Death Act are based upon simple negligence.

Additionally, the facts of this case are so closely related to activity traditionally subject to admiralty law that the reasons for applying federal maritime law in this case are undeniably present. In sharp contrast to *Yamaha*, which was a products liability action arising from a recreational jet ski accident, the present action bears a substantial connection with traditional maritime activity. Here, we do not have a case involving a pleasure craft, or an airplane falling into navigable waters, but a case involving an allision of a commercial tug and tow with a railroad bridge, that took place in the ordinary course of maritime business, on a waterway subject to heavy commercial traffic. Moreover, in contrast to the jet ski collision in *Yamaha*, the allision in our case substantially disrupted the flow of maritime commerce. Thus, the facts of this case, unlike those in *Yamaha*, give rise to federal maritime interests that are decidedly commercial in nature. Accordingly, the actors in this case are entitled to the application of a body of laws – maritime laws – that have been fitted over the years for just these types of situations.

Finally, federal maritime law should be applied here because Congress, in passing the Admiralty Extension Act ("Act"), 46 U.S.C. § 740 (1975), made clear its intent that in situations involving an allision between a vessel and a shore object, such as a railroad bridge, state laws should yield to federal maritime law. The general rule before the passage of the Act was that ship-to-shore tort

claims were not maritime claims to be heard in the admiralty courts, but were instead common law claims triable in state court and governed by state law. *The Admiral Peoples*, 295 U.S. 649, 651, 55 S.Ct. 885, 886, 79 L.Ed. 1633 (1935). Bridges, wharves, and the like were viewed as extensions of land. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214-15, 90 S.Ct. 347, 348-50, 24 L.Ed.2d 371 (1969).

The Admiralty Extension Act extended admiralty jurisdiction to cover "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1975). It is clear from its legislative history that the primary purpose of the Act was to eliminate the inconsistent and unfair results that could arise from adjudicating the cross claims in allision cases according to different and conflicting legal principles.

> As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery. . . . The bill under consideration would correct these inequities.

See Sen. Rep. No. 1593, 80th Cong., 2d Sess., *reprinted in* 1948 U.S.Code Cong. Serv. 1898. In light of this legislative history, many courts subsequently have suggested, and

some have explicitly stated, that a claim cognizable in admiralty by virtue of the Admiralty Extension Act is governed by the general maritime law. *See, e.g., Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209-210, 83 S.Ct. 1185, 1187-88, 10 L.Ed.2d 297 (1963); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 208-11, 92 S.Ct. 418, 422-25, 30 L.Ed.2d 383 (1971); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204, 212 (5th Cir.1968); *Pryor v. American President Lines*, 520 F.2d 974, 979-80 (4th Cir.1975).

In sum, applying the Alabama wrongful death act in this case so as to allow recovery for wrongful death based upon simple negligence only would deprive the litigants of substantive admiralty rights that must be applied given the exceedingly commercial nature of this incident. Moreover, application of such feature of Alabama law under the present facts would run counter to Congress' intent that admiralty law govern suits involving ship-to-shore allisions.

Accordingly, as the federal maritime interests present in this action outweigh Alabama's interests in having its wrongful death statute apply in its entirety, we hold that the district court erred in applying the Alabama wrongful death statute to the wrongful death claims in this action insofar as such Alabama statute provides for the recovery of punitive damages for simple negligence only and prohibits apportionment of fault and damages among joint tortfeasors.

In the case of *American Dredging Co. v. Lambert*, 81 F.3d 127, 130 (11th Cir.1996), this Court held that *Yamaha, supra*, extended the right of recovery in wrongful death

cases to the nonpecuniary remedies afforded by the Florida Wrongful Death Act to actions for wrongful death to non-seamen occurring in state territorial waters. The plaintiffs in the wrongful death actions have available to them the remedies provided in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). In addition, although such plaintiffs cannot recover punitive damages for simple negligence, they may recover punitive damages upon a showing of "intentional or wanton and reckless conduct" on the part of defendants amounting to "a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir.1995). This is because the standard of liability necessary for the recovery of punitive damages is governed by admiralty law. Alabama law provides only the remedy which under *Yamaha* is now available to these wrongful death claimants in admiralty.

C.

Appellants also contend that the district court erred in finding that the personal injury plaintiffs in this action may seek nonpecuniary damages under the general maritime law for loss of society, loss of consortium, and punitive damages. We agree with Appellants' contention.

Appellees suggest that *Yamaha* somehow extended state law remedies to personal injury actions to non-seamen occurring in state territorial waters. First, *Yamaha* dealt only with wrongful death actions and has no relevance to personal injury actions. Second, the historical basis for wrongful death actions in admiralty is entirely separate from that for personal injuries, quoting from

Gilmore And Black, The Law Of Admiralty, Second Edition, Chapter VI, § 6-29:

> In the [sic] Harrisburg[6] the Supreme Court held that no cause of action for wrongful death was provided by the general maritime law. In The Hamilton, which involved a high seas collision between ships owned by Delaware corporations, the Court held that the gap in the maritime law created by The Harrisburg could be filled by allowing a recovery for wrongful death under a statute of the State of Delaware. Then or later statutes providing recovery for wrongful death were enacted in all states. On March 30, 1920, Congress enacted the Death on the High Seas Act (DOHSA) which provided a recovery for death "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State [Territory or dependency]." On June 5, 1920, Congress enacted the Jones Act which incorporated the wrongful death provisions of the Federal Employers' Liability Act [FELA]. DOHSA and the Jones Act, enacted almost simultaneously, were hopelessly inconsistent with each other both as to the nature of the wrongful death recovery and as to the classes of beneficiaries entitled to recover. From 1920 until 1970 the lower federal courts, with occasional help from the Supreme court, attempted to impose a degree of order on this statutory chaos. In 1970 the Supreme Court overruled The Harrisburg in Moragne v. States Marine Lines, Inc. and held, in a unanimous decision, that a remedy for

---

[6] *The Harrisburg,* 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886).

> wrongful death was provided by the general maritime law. (Footnotes omitted).

Although Congress provided for remedies for wrongful death on the high seas (DOHSA) and for wrongful death to seamen *(The Jones Act)*, Congress has never provided a remedy for wrongful death to non-seamen in state territorial waters.[7] Therefore, prior to *Moragne*, the admiralty courts looked to the state wrongful death actions to provide a remedy in such actions, and that situation existed until 1970 when the Supreme Court decided *Moragne* which for the first time gave an admiralty common law right of action for wrongful death of non-seamen in state territorial waters.

Twenty-six years later, the Supreme Court in *Yamaha*interpreted [sic] *Moragne* as adding remedies and not deleting any remedies which existed prior to *Moragne*. Admiralty remedies for personal injury existed prior to *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886). *See Leathers v. Blessing* 105 U.S. 626, 15 Otto 626, 26 L.Ed. 1192 (1881). Therefore, there was no need to look to state law for remedies in the case of non-seamen injured in state territorial waters and no need for a *Moragne* decision or a *Yamaha* decision. Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as loss of society, loss of consortium or

---

[7] Congress has provided for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, but such act is not relevant to the Court's rationale.

punitive damages, except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing. We are aware of no decision in the Supreme Court or in any of the circuit courts which has authorized punitive damages in a personal injury case.

In *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir.1993), we looked disfavorably on the availability of nonpecuniary damages under the general maritime law. Specifically, we held that "neither the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases." *Id.*

Today, we expressly extend our holding in *Lollie* to preclude the availability of punitive damages in personal injury actions brought under the general maritime law. Accordingly, we vacate the district court's ruling that the personal injury plaintiffs in this action are entitled to pursue such nonpecuniary damages.

III. Conclusion

For these reasons, we VACATE the order of the district court and REMAND this action for additional consideration not inconsistent with this opinion.[8]

---

[8] The motion for expedited ruling, filed in this appeal, is denied as moot.

HILL, Senior Circuit Judge, specially concurring:

We have, here, undertaken to lay down controlling law to govern further proceedings in some one hundred or more litigations. I am persuaded that the opinion now prepared for us by Judge Howard is the correct resolution of this task.

We have followed the channel markers and beacons as well as we ascertain them to be, but between *The Harrisburg*, *Moragne*, and *Yamaha*, and interstitially open between the *Death on the High Seas Act* and the *Jones Act*, there are some unchartered waters.

Under such circumstances, the M/V Mauvilla took a wrong turn into Big Bayou Canot. Its skipper should have kept it in the Mobile River.

We trust that we have not made a similar wrong turn. We do not wish to steer one hundred cases into unmarked obstructions. Being persuaded that we have not done so, I am pleased to concur.

APPENDIX B

JUDGMENT OF THE ELEVENTH CIRCUIT

SEPTEMBER 11, 1997

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6833

District Court No. 94-5000-RV

IN RE: AMTRAK "SUNSET LIMITED" TRAIN CRASH IN BAYOU CANOT, ALABAMA, ON SEPTEMBER 22, 1993.

JAMES ALTOSINO; MARIE V. ALTOSINO; JOHN L. ANDERSON; ALICE ANELLO; JOSEPH ANELLO, et al.,

Plaintiffs-Appellees,

versus

WARRIOR & GULF NAVIGATION COMPANY; WILLIE C. ODOM; ANDREW STABLER; CSX TRANSPORTATION, INC.; NATIONAL RAILROAD PASSENGER CORPORATION d.b.a. Amtrak,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Alabama

---

Before BARKETT, Circuit Judge, HILL, Senior Circuit Judge, and HOWARD*, Senior District Judge.

---

*Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

JUDGMENT

(Filed Sep. 11, 1997)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for additional consideration in accordance with the opinion of this Court;

It is further order that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

HILL, Senior Circuit Judge, specially concurred and filed an opinion.

Entered: September 11, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 11/7/97

APPENDIX C

ORDER AND REASONS OF
UNITED STATES DISTRICT COURT

For the Southern District of Alabama (Southern Division)

JUNE 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

AMTRAK "SUNSET LIMITED" TRAIN CRASH IN BAYOU CANOT, ALABAMA ON SEPTEMBER 22, 1993	MDL Docket No. 1003 Master Docket No. 94-5000-RV-C This order relates to: ALL ACTIONS

ORDER NO. 87: SUBJECT MATTER JURISDICTION, GOVERNING LAW, AND RECOVERABLE DAMAGES

On September 22, 1993, a vessel and/or barge owned and operated by Warrior & Gulf Navigation ("WGN") struck a railroad bridge owned and maintained by CSX Transportation, Inc. ("CSX"). The bridge extended over Big Bayou Canot, a 14-mile long tributary of the Mobile River located near Chickasaw, Alabama, in Mobile County. Soon after the allision, a passenger train, owned and operated by the National Railroad Passenger Corporation ("Amtrak"), derailed as it attempted passage over the bridge. Forty seven passengers and crew members perished in the ensuing crash; scores of others were injured.

The crash precipitated the filing of lawsuits by representatives of several of the deceased and a number of the injured, principally against WGN, CSX, Amtrak, and two WGN employees, Willie C. Odom ("Odom") and Andrew Stabler ("Stabler").[1,2] The Judicial Panel on Multidistrict

---

[1] Several lawsuits originated in federal court and attempted to invoke the court's diversity and federal question jurisdiction. Other lawsuits originated in state court but were removed by defendant Amtrak, a federally-chartered corporation, to this court. Representatives of the deceased Amtrak crew members filed suit in state court under the Federal Employer's Liability Act. Those actions are not removable to this court. Several of the injured Amtrak employees filed suit in this court.

[2] Before any of the tort actions were filed, WGN filed a limitation of liability action in this court. *In the Matter of the Complaint of Warrior & Gulf Navigation Company for its Interest in and to the Vessel M/V MAUVILLA for Exoneration from and Limitation of Liability*, Civil Action No. 93-0790-RV-C (S.D. Ala.). That action was voluntarily dismissed by WGN after a few months. In its order granting WGN's motion for dismissal, this court expressly provided that all discovery taken in the limitation action could "be used by any party in any other action arising out of said bridge striking." *Id.*, Order of Feb. 16, 1994, at 2. In the Initial Case Management Order entered in this case on April 8, 1994, the court again reiterated the right of the parties to use discovery taken in the limitation action in this case.

Litigation consolidated the lawsuits in this court for purposes of all pretrial proceedings.[3],[4]

During the initial case management conference, held on March 30, 1994, the court discussed with counsel the desirability of making a pretrial determination of the law (*i.e.*, state or admiralty) applicable to the personal injury and wrongful death claims. Briefing was ordered, *see* Order No. 2, dated April 8, 1994, at 17, and the court conducted oral argument on June 29, 1994, on the issues raised. Several supplemental briefs were filed in the months following, with the last such briefs having been received on March 11, 1996, and additional oral argument was heard on February 8, 1996.

Contemporaneous with the parties's briefing and the court's consideration of the applicable law, WGN, Stabler, and Odom filed motions to strike in each of the first thirty-eight tort actions filed in or transferred to this court. *See* Civil Action Nos. 94-5001 through -5028, and -5030 through -5039. By those motions, WGN, Stabler, and

---

[3] Presently, there are one hundred and twelve personal injury and wrongful death cases pending in this court. Cumulatively, those cases represent the claims of forty-three of the deceased and seventy-four of the injured (including eight injured Amtrak employees). A majority of the suits were filed following issuance of the Judicial Panel on Multidistrict Litigation's consolidation order. Most of those suits aver jurisdiction exists by virtue of the JPMDL's order.

[4] In addition to the aforementioned tort actions, pending before the court is a contribution/indemnity action brought by WGN against CSX and Amtrak. CSX and Amtrak have counterclaimed in that case against WGN, also for contribution and indemnity. *See* Civil Action No. 94-5029.

Odom seek an order striking from each of the involved complaints claims for damages that they contend are not recoverable in the general maritime personal injury and wrongful death actions. Resolution of those motions requires a determination of the law applicable at least to the claims asserted against WGN, Stabler, and Odom.

A vast majority of the plaintiffs filed uniform personal injury and wrongful death complaints. Those complaints, as well as all of the other, non-uniform complaints, raise an issue as to the law applicable to this case, most directly by the nature and scope of the damages claimed against each of the defendants. The issue also is raised by the defendants's answers to all of the complaints, wherein the defendants basically aver either that admiralty law governs the plaintiffs's claims or that those claims are preempted by federal law.

The court has duly considered all of the briefs and materials that were filed on the applicable law and recoverable damages. The court also has carefully reviewed the relevant case law. Having done so, the court makes the following factual and legal determinations.

Background[5]

A. Big Bayou Canot

Big Bayou Canot (the "bayou") is a 14-mile long waterway that originates and terminates in the Mobile River. (The Mobile River is a tidal waterway, used for commercial purposes, that connect to and extends northward from Mobile Bay.) The bayou has a controlling depth of 18 feet throughout its entire length; its width varies from 350 feet to 250 feet. CSX/Amtrak Exhibit 3, Army Corps of Engineers's ("ACE") Navigability Report dated November 16, 1931, at 3; WGN/Odom/Stabler Exh. A, ACE Navigability Report, at 3. The plaintiffs concede that the bayou is "influenced" by the ebb and flow of the tide. Plaintiffs's brief on the applicable law and recoverable damages, tab 103, at 2.

A railroad bridge owned by CSX traverses the bayou. At the time of the occurrence made the basis of this litigation (the "derailment" or "allision"), the bridge had a vertical clearance of 7.5 feet at low water. CSX/Amtrak Exh. 6, Aff. of R. Thompson, ¶ 3. The bridge is located approximately one-half mile from the point at which the

---

[5] Much of the evidence presented by the defendants in connection with the issues addressed in this order was obtained during the course of the limitation action, referred to *supra* at note 2. That documentary evidence was submitted in this case without objection by the plaintiffs. Indeed, although the plaintiffs initially suggested that an evidentiary hearing was necessary to resolve the issues presented on the applicable law, they later agreed that the matter could be resolved on the basis of the documentary evidence submitted by the defendants and the relevant case law.

bayou originates in the Mobile River. The bridge is approximately 400 feet long.

Prior to the derailment, the Army Corps of Engineers noted a history of log rafts and small motor boats on the bayou. CSX/Amtrak Exh. 1, NTSB Tr. at 411; Exh. 3, ACE Navigability Report, at 4; *see* Exh. 2, Coast Guard Findings, at 22, ¶ 94; *see also* WGN/Odom/Stabler Exh. A, ACE Navigability Report, at 4.

WGN employees testified (in connection with the limitation action, referred to *supra* at note 2) that WGN used the bayou in the early 1980s to fleet barges as part of WGN's commercial activities on the Mobile River. CSX/Amtrak Exh. 4, Depo. of P. Hartman, at 34-41; Exh. 5, Depo. of J. Crocker, at 12-13. Moreover, commercial vessels navigated the bayou in the course of conducting rescue operations in the wake of the derailment. CSX/Amtrak Exh. 1, NTSB Tr. at 19, 33, 106, 109, 178-79.

The Army Corps of Engineers Bayou has found the bayou to be navigable throughout its entire length. CSX/Amtrak Exh. 3, ACE Navigability Report, at 4; Exh. 3, ACE Current List of Waters, at 5; *see* WGN/Odom/Stabler Exh. A, ACE Navigability Report, at 4; Exh. B, ACE Current List of Waters.

B. The September 22, 1993, Occurrence

On September 22, 1993, at or about 2:45 a.m., a WGN commercial towing vessel, the M/V MAUVILLA, and/or two of its six barges, operating in the bayou, struck the CSX railroad bridge (or one of its piers) that extended over the bayou. CSX/Amtrak Exh. 1, NTSB Tr. at 6-7; Exh. 2, Coast Guard Findings, p. 31; Exh. 11, NTSB Paint

Sample Analysis; Exh. 12, FBI Report. Each of the personal injury and wrongful death complaints aver that the M/V MAUVILLA and/or its barges struck the bridge, that the allision preceded the Amtrak train derailment, and that the allision was a proximate cause of the plaintiffs's losses. WGN and Odom admit, in each of their answers to the plaintiffs's complaints, that the striking occurred and was due, at least in part, to the fault of Odom. WGN acknowledges responsibility for Odom's actions in its capacity as Odom's employer.[6,7]

The allision laterally displaced the bridge and tracks. The displacement contributed, at least in part, to the derailment of the Amtrak "Sunset Limited" passenger train when the train attempted to cross the bridge shortly thereafter. *See* CSX/Amtrak Exh. 1, NTSB Tr. at 6-7; Exh. 2, Coast Guard Findings, at 31; Exh. 12, FBI Report.

Three locomotives, a baggage car, a crew dormitory car, and two passenger coaches plunged into the bayou.

---

[6] The National Transportation Safety Board, Coast Guard, and Federal Bureau of Investigation each conducted investigations into the cause of the derailment in the ensuing days, weeks, and months. Each separately concluded that contact between the M/V MAUVILLA or its barges and the bridge was a precipitating cause. CSX/Amtrak Exh. 1, NTSB Tr. at 6-7; *see also* Exh. 11, NTSB Paint Sample Analysis, p. 3 (concluding that paint specimens from WGN barge originated from the bridge); Exh. 2, Coast Guard Findings, p. 31; Exh. 12, FBI Report, p. 3-4.

[7] Individual plaintiffs's complaints also include detailed allegations against CSX and Amtrak, among others, and aver that those defendants's actions also proximately caused or contributed to the plaintiffs's losses.

Four cars remained on the portion of the bridge that was still standing. CSX/Amtrak Exh. 1, NTSB Tr. at 18.

Forty-two passengers died in the crash. All drowned in the bayou. CSX/Amtrak Exh. 7, Death Certificates. Some of the injured passengers were rescued from the bayou, CSX/Amtrak Exh. 1, NTSB Tr. at 109; Exh. 8, Stmt. by G. Farmer, at 72; Exh. 9, Stmt. By C. Jones, at 2; Exh. 10, Stmt. by W. Odom, at 71-72; others were rescued from the train cars remaining on the bridge.

Preliminary rescue efforts in the immediate aftermath of the occurrence were conducted by waterborne vessels operating in the bayou. CSX/Amtrak Exh. 1, NTSB Tr., at 166, 179-80. In the wake of the allision and derailment, the bayou was closed to vessel traffic by the Coast Guard. CSX/Amtrak Exh. 15, Coast Guard Bulletin.

Discussion

The court must resolve two principal issues. First, does the court have admiralty jurisdiction over this case? In resolving that issue, the court must separately query whether admiralty jurisdiction is properly invoked against the water-based (WGN, Stabler, and Odom) *and* land-based (CSX and Amtrak) defendants. Second, assuming the court has admiralty jurisdiction and, hence, that admiralty law applies, what damages are recoverable by the personal injury and wrongful death plaintiffs? Under the latter inquiry, the court preliminarily must determine whether the court should apply Alabama's wrongful death statute as surrogate admiralty law or the general maritime wrongful death action recognized in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), in

determining, *inter alia*, the legal duties owed by the defendants and damages recoverable, and identifying the wrongful death beneficiaries. The court shall address these issues seriatim.

A. Admiralty Jurisdiction

A party seeking to invoke the court's admiralty jurisdiction over a tort claim must establish that the plaintiff's claim has both a maritime "situs" and a maritime "nexus." *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *see Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 130 L. Ed. 2d 1024, 1035 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). The "situs" or location prong requires proof (1) that the tort occurred on navigable waters, or (2) that injury suffered on land was caused by a vessel on navigable waters. The "nexus" or maritime connection prong requires proof that the activity from which the incident arose (1) has a substantial relationship to traditional maritime activity, and (2) has a potentially disruptive impact on maritime commerce. If both prongs of the test are satisfied, then this court must exercise its admiralty jurisdiction and apply substantive admiralty law to the plaintiff's claim. *East River Steamship Corp. v. Transamerica Delavel, Inc.*, 476 U.S. 858, 864 (1986); *accord Penton v. Pampano Constr. Co.*, 976 F.2d 636, 639 n.6 (11th Cir. 1992); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1553, 1529 (11th Cir. 1990).[8]

---

[8] Of course, the "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law. . . . [F]ederal admiralty courts sometimes do apply state law."

1. The "situs" requirement

a. *Is Bayou Canot Navigable?*

As noted, the "situs" predicate to the exercise of admiralty jurisdiction is satisfied when the incident giving rise to the claim occurred on navigable waters *or* the alleged negligence took effect on navigable waters. The threshold issue, thus, is whether Bayou Canot is "navigable."

"Navigability" has a particular meaning in admiralty law. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979) (discussing different definitions of "navigability" in various contexts). Historically, navigable waterways within the meaning of admiralty jurisdiction included only those that were subject to the ebb and flow of the tide. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451, 455 (1852). The Supreme Court extended admiralty jurisdiction, however, to include events occurring on non-tidal waterways that were nevertheless either actually used for or "susceptible to commercial navigation." *see, e.g., id.* at 454-58; *see also The Daniel Ball* 77 U.S. (10 Wall.) 557, 563 (1871).[9] Today, to qualify as a "navigable waterway" within the meaning of admiralty law, a

---

Grubart v. Great Lakes Dredge & Dock Co., 130 L. Ed. 2d 1024, 1042 (1995). That fact is especially relevant to this court's discussion, *infra*, of the damages recoverable in admiralty by the wrongful death plaintiffs.

[9] There is no indication that by expanding admiralty jurisdiction to include non-tidal waterways that are "susceptible to commercial navigation," the Supreme court intended to restrict the application of such jurisdiction on tidal waterways by imposing the susceptible-to-commercial-navigation standard to them as well. Indeed, at least one court

body of water must be either (1) actually used or susceptible of use for commercial navigation, or (2) subject to the ebb and flow of the tide, *see, e.g., Executive Jet*, 409 U.S. at 253; *The Daniel Ball*, 77 U.S. (10 Wall.) at 563; *see also The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) at 451, 455.[10]

Bayou Canot satisfies both tests of navigability independently.[11],[12] First, the defendants have offered proof, in the form of a 1931 navigability report by the Army Corps

---

expressly has held that tidal waters need not meet the susceptible-to-commercial-navigation test as a predicate to the federal court's exercise of admiralty jurisdiction over them. *See Otto v. Alper*, 489 F. Supp. 953, 954 (D. Del. 1980).

[10] The plaintiffs appear erroneously to reject "ebb and flow of the tide" as a sufficient test of navigability and to contend that the sole controlling standard of navigability is whether the waterway supports "present commercial activity," rather than is merely susceptible of use by commercial concerns. Plaintiffs's brief re: applicable law and damages recoverable, tab 103, at 2-11.

[11] The Coast Guard uses a different definition of "navigable waters" for its own regulatory purposes than that which is used by the courts for purposes of determining whether admiralty jurisdiction exists. *See* 33 C.F.R. § 2.05-25; *see also* CSX/Amtrak Exh. 2, Coast Guard Findings, at 22, ¶ 95. With respect to the regulation of bridges, the Coast Guard focuses on whether there is *actual* commercial use of the waterway in question; susceptibility to commercial navigation is not enough. *See* 33 C.F.R. §§ 115.70, 118.40(b); *see also* CSX/Amtrak Exh. 2, Coast Guard Findings, at 20-21, ¶¶ 88, 89, 92.

[12] The determination of navigability is a question of fact, and the burden of proof rests with the party seeking to invoke admiralty jurisdiction. *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991)

of Engineers, that the bayou is a tidal waterway. That report states, in relevant part, as follows:

> General Description. – Bayou Canot, Alabama, is one of the streams in the Mobile Delta. It has its origin, called its upper mouth, on the west side of Mobile River. The stream meanders through the delta west of Mobile River for a distance of approximately 14 miles. At this point it re-enters Mobile River from the west about 12 miles above its mouth, and at a point opposite the head of Twelve Mile Island, 9 miles above the city of Mobile, Ala.
>
> Bayou Canot, Alabama, has a controlling depth of 18 feet throughout its entire length and its width varies from 350 feet to 250 feet. The banks of this waterway are low and free from overhanging trees.
>
> *The stream is tidal.* Under ordinary conditions a mean tidal range of about 1.75 feet, and an extreme tidal range of 3.5 feet exists. A high tide of 10 feet has been noted during hurricanes. There are no dams, no rapids, and the tidal currents are not rapid.
>
> One bridge crosses this stream. . . .

CSX/Amtrak Exh. 3, ACE Navigability Report, at 3; WGN/Odom/Stabler Exh. A, ACE Navigability Report, at 3. Although the Army Corps's finding is not binding on this court, it is entitled to substantial weight in determining whether admiralty jurisdiction exists.[13] *See, e.g.*,

---

[13] The standard of "navigability" used by the Army Corps of Engineers is similar to the standard of "navigability" used for purposes of admiralty law. *See Duke v. United States*, 711 F. Supp.

Sanders v. Placid Oil Co., 861 F.2d 1374, 1378 (5th Cir. 1988); *Finneseth v. Carter*, 712 F.2d 1041, 1045 n.4 (6th Cir. 1983). When combined with the plaintiffs's concession that Bayou Canot is "influenced by the ebb and flow of the tide," *see* Plaintiffs's brief re: applicable law and damages recoverable, tab 103, at 2, the proof is sufficient to support the legal conclusion that the bayou is a navigable waterway within the meaning of admiralty law.[14]

Second, the bayou unquestionably is susceptible to commercial navigation, whether or not it, in fact, was used, regularly or irregularly, for that purpose. As the undisputed facts recited *supra* indicate, the bayou not only is wide enough and deep enough to accommodate vessel traffic, but WGN used it in the early 1980s to fleet barges as part of WGN's commercial activities on the Mobile River. Additionally, commercial vessels entered

---

332, 333 (E.D. Tex. 1989). The Corps of Engineers defines the term "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

[14] The bayou originates and terminates in the Mobile River. The accident made the basis of this action occurred on the lower portion of the bayou, near where the bayou re-enters the Mobile River. The Mobile River is subject to the ebb and flow of the tide, *see, e.g., Coyle Lines, Inc. v. United States*, 195 F.2d 737, 738 (5th Cir. 1952), and courts repeatedly have applied admiralty law to events occurring on it and its tributaries, *see, e.g., Louisville & Nashville Railroad Co. v. The Commander*, 199 F. Supp. 217, 217-18 (Thomas, J.); *see also Mount Washington Tanker Co. v. Wahyuen Shipping, Inc.*, 833 F.2d 1541, 1542 (11th Cir. 1987); *Amerada Hess Corp. v. M/T Mariam*, 553 F. Supp. 158, 159, 166 (S.D. Ala. 1982).

the bayou and conducted rescue operations there in the wake of the derailment.

Contrary to the plaintiffs's strong assertions, the fact that the bayou is not, and was not at the time of the occurrence made the basis of this action, actually used for commercial navigation is irrelevant for purposes of the jurisdictional analysis. *See, e.g., Richardson v. Foremost Ins. Co.*, 641 F.2d 314, 316 (5th Cir. 1981), *aff'd on other grounds*, 457 U.S. 668 (1982).[15] Rather, "[t]he *capability* of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874) (emphasis added).[16]

---

[15] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[16] The CSX railroad bridge over the bayou does not alter the bayou's status as a waterway that is susceptible to commercial navigation. Again, the Army Corps of Engineers's 1931 report presented by the defendants establishes that the bayou is sufficiently wide and deep to accommodate navigation by vessels more substantial than mere pleasure craft and log rafts. That report was issued at a time when the CSX railroad bridge was in place; nevertheless, the Corps declared the bayou to be a navigable waterway, notwithstanding the presence of the bridge. The testimony of WGN employees, moreover, establishes that the lower portion of the bayou, where the M/V MAUVILLA was located at the time of the Amtrak derailment, in fact supported commercial activity at least during the early 1980s.

Even if the bayou were non-navigable above the bridge, the incident would be analogous to the striking of a dock by a vessel

b. *Where did the accident occur or the alleged negligence take effect?*

Given the bayou's status as a navigable waterway, the "situs" requirement for admiralty jurisdiction would be satisfied in this case if the incident giving rise to the claims occurred in the bayou (whether or not the injury occurred there or on land) or if the alleged negligence took effect there (assuming that the breach occurred on land). Clearly, that is the case here where a precipitating cause of the accident, as alleged by all of the plaintiffs and as admitted by WGN – the striking of the bridge by the M/V MAUVILLA or its barges – occurred in the bayou, and all deaths and most injuries and property damage occurred there as well.

The situs requirement is met in cases in which injury was caused, in whole or in party [sic], by a ship or other vessel operating on navigable waters, whether or not the injury manifested itself on navigable waters or on land. *Grubart v. Great Lakes Dredge & Dock Co.*, 130 L. Ed. 2d 1024, 1033-34 (1995). Under traditional maritime principles, claims arising out of water-based injuries caused by the wrongful conduct of vessels on navigable waters were governed by admiralty law. *Id.* When, in 1948, Congress enacted the Admiralty Extension Act, it extended admiralty jurisdiction to include the claims of persons who are

---

(i.e., an incident at the edge/shore of navigable waters). Such an incident is clearly governed by admiralty law. *See, e.g., Lipworth v. Kawasaki Motors Corp.*, 592 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App.), *cert. denied*, 121 L. Ed. 2d 373 (1992) (applying admiralty law to collision by jet ski with dock).

injured on land by the wrongful acts of a vessel on navigable water.[17] *Id.*

Clearly, the situs requirement is met with respect to the claims against WGN, Stabler, and Odom. As the undisputed facts recited *supra* indicate, all of the fatalities and most of the personal injuries and property damage actually occurred in navigable water, having been caused, at least in part, by the act of a vessel operating on a navigable waterway.

Applying the Admiralty Extension Act, it is clear that the situs requirement also is met with respect to the claims against WGN, Odom, and Stabler that are asserted by individuals who sustained injuries or losses on land (or, more particularly, in the Amtrak coaches that

---

[17] The Admiralty Extension Act provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740. "The Act pointedly does not require that the plaintiff's claim for relief be based *exclusively* upon the actions of 'a vessel on navigable water.' Rather, its broad language would seem to embrace 'all cases' where, as here, a vessel so situated plays a substantial role in causing the damages alleged." *Parsell v. City Lumber Co.*, 1977 A.M.C. 1704, 1709 (D. Conn. 1976) (emphasis in original) (quoting Admiralty Extension Act). Indeed, the Act's legislative history specifically discusses the goal of the Act to extend admiralty jurisdiction to bridge striking cases, including cases where persons on the bridge are injured, and cases where both the bridge owner and the vessel owner are at fault. *See* 1948 U.S.C.C.A.N. 1898, 1899, 1902-03.

derailed but remained standing on the bridge). Similarly, it is satisfied with respect to the property damage claims against WGN relating to parts of the bridge that remained standing and to the Amtrak cars that remained on the bridge.

The situs requirement also is met with respect to the claims against the land-based defendants, CSX and Amtrak. In making that determination, it is proper to consider the WGN/Odom/Stabler conduct, whether that conduct was a contributing if not the principal cause of the occurrence in this case. *See Grubart*, 130 L. Ed. 2d at 1035-37. Under that analysis, the situs requirement is met for the reasons set forth above.[18], [19]

---

[18] Allegations that certain conduct by CSX and Amtrak may have occurred on land are irrelevant to the "situs" analysis. *See, e.g., Icelandic Coast Guard v. United Technologies Corp.*, 722 F. Supp. 942 (D. Conn. 1989) (situs requirement met in action by owner of helicopter that crashed at sea against the helicopter's manufacturer); *see also Miller v. United States*, 725 F.2d 1311, 1312, 1315 (11th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319, 321 (5th Cir. 1980).

[19] Even if it were proper for the court only to focus on the conduct of CSX and Amtrak – conduct that is alleged by the plaintiffs, at least as against CSX, to include both land- and water-based breaches of duties of care – in determining whether the situs requirement is met, it is clear that the requirement is met, at least with respect to those plaintiffs whose losses occurred in the bayou. For purposes of this inquiry, the court must focus on "where the alleged negligence took effect, rather than where the negligent act was done." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 782 (11th Cir. 1984) (internal quotations omitted). The "situs" requirement is satisfied as against these defendants if the alleged injuries occurred in navigable waters, regardless of where the allegedly

As the foregoing demonstrates, all alleged deaths, injuries, and property damage arising from the bridge striking and subsequent derailment occurred in the navigable waters of the bayou, or as a proximate result of the bridge striking in those waters. Thus, all have a maritime situs.

2. The "nexus" requirement

In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972), the Supreme Court held that in addition to having a maritime situs, "the wrong [must also] bear a significant relationship to traditional maritime activity." As further refined in *Sisson v. Ruby*, 497 U.S. 358, 362 (1990), the "nexus" test is satisfied when the activity from which the incident arose (1) had a substantial relationship to a traditional maritime activity, *and* (2)

---

negligent act occurred. *See, e.g., In re Motor Ship Pacific Carrier*, 489 F.2d 152, 155, 157 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974).

Significantly, courts readily have found the "situs" requirement met for all claims flowing from water-based bridge strikings, including claims against land-based parties for injuries occurring in the water or on land. *See, e.g., Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir. 1968) (claims against, *inter alia*, bridge construction company for injuries to bridge workers in vessel-bridge striking); *APAC-Arkansas, Inc. v. Tugboat Melissa L*, 613 F. Supp. 1532 (W.D. Ark. 1985) (claims against, *inter alia*, railroad charged with operating bridge for damage to bridge from, and re-routing costs after, vessel-bridge striking); *see also Ashland Oil, Inc. v. Third National Bank*, 557 F. Supp. 862 (E.D. Ky. 1983) (claims against, *inter alia*, owner/operator of gasoline tank farm for deaths, injuries, and property damage on land arising from unloading of vessel).

had a "potentially disruptive impact on maritime commerce." *see also Grubart*, 130 L. Ed. 2d at 1037-44.

The maritime "nexus" requirement is satisfied in this case because the occurrence on September 22, 1993, was precipitated, in part, by the striking of the bridge by the WGN commercial vessel. The operation of a vessel is at the core of this litigation; thus, the entire occurrence is substantially related to traditional maritime activity. In addition, the activity in the bayou and on the Mobile River that existed in the wake of the occurrence illustrates that such an accident has the potential to disrupt maritime commerce.

a. ***Does the activity from which the incident arose have a substantial relationship to maritime activity?***

The "nexus" analysis must begin with a determination of the activity from which the incident arose. *Sisson*, 497 U.S. at 364; *Grubart*, 130 L. Ed. 2d at 1038. The "relevant 'activity' is defined not by the particular circumstances of the incident, but by *the general conduct from which the incident arose.*" *Sisson*, 497 U.S. at 364 (emphasis added).[20]

---

[20] The *Sisson* Court explained:

> This focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question.

Sisson, 497 U.S. at 364-65.

In making a determination on the law applicable to this case the court, therefore, is not required to make a finding on the "precise cause" of a particular injury. *Id.* at 365; *see also Grubart*, 130 L. Ed. 2d at 1037. Rather, the court simply must determine "the general conduct from which the incident arose." *Sisson*, 497 U.S. at 364. That determination is easily made in this case because it already has been alleged, acknowledged (by WGN and Odom), and established that the general conduct from which this incident arose was a traditional maritime activity – the operation of a commercial vessel on a navigable waterway.

"[A]s a general rule, the involvement of a vessel in a case strongly disposes a court to apply admiralty law." *Penton*, 976 F.2d at 641; *accord American Global Lines, Inc. v. United States*, 645 F. Supp. 783, 785 (S.D.N.Y. 1986) (the operation of a vessel "clearly bears a relation to traditional maritime activity"); *Parsell v. City Lumber Co.*, 1977 A.M.C. 1704, 1709 (D. Conn. July 21, 1976) (admiralty jurisdiction applies to all cases where a vessel on navigable waters "plays a substantial role in causing the damages alleged"). Indeed, the navigation of boats in navigable waters "clearly falls within the substantial relationship" test. *Grubart*, 130 L. Ed. 2d at 1038.

Under the Supreme Court's *Grubart* case, the involvement of the WGN vessel as "one of the arguably proximate causes of the incident" giving rise to the plaintiffs's losses satisfies the substantial relationship test as against all of the defendants, including CSX and Amtrak. *Grubart*, 130 L. Ed. 2d at 1039-40 ("The substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have

been a proximate cause of the incident."). That is so even if land-based negligence or wantonness on the part of CSX or Amtrak allegedly contributed to those losses.

b. ***Did the occurrence have a potentially disruptive impact on maritime commerce?***

The only remaining question under the *Sisson* "nexus" analysis is whether the occurrence had a potentially disruptive impact on maritime commerce. The potential disruption is readily apparent in this case where the destruction of the bridge, derailment of railway cars into the bayou, and rescue and salvage and repair efforts all had the potential to disrupt maritime commerce.

In *Sisson*, when the Supreme Court considered whether the incident giving rise to the claims had a potentially disruptive impact on maritime commerce, the Court cautioned that

> [t]he jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the [vessel] . . . more or less likely to disrupt commercial activity. *Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.*

Sisson, 497 U.S. at 363 (emphasis added). *See generally Grubart*, 130 L. Ed. 2d at 1037-38 (discussing *Sisson*'s "potentially disruptive impact" analysis). Indeed, prior

Supreme Court precedent suggested that a potential disruption of maritime commerce could be held to exist where the tort and loss occurred in an area seldom, if ever, used for maritime commerce. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982).

Since the incident at issue in this case was preceded by the striking of a bridge by a commercial vessel and the resulting effects occurred in large part on the navigable waterway, there can be no question that the incident had the potential to disrupt maritime commerce. The striking of a bridge by a vessel could well result in the closing of a waterway to vessel traffic during repair of the bridge. It might also result in obstructions in the waterway from remnants of the bridge or vehicles from the bridge that were thrown into the water. Indeed, as the undisputed facts recounted *supra* indicate, in this case the bridge striking actually had a disruptive impact on maritime commerce.

In sum, both parts of the "nexus" test are satisfied in this litigation. That conclusion, when combined with the court's earlier conclusion that both parts of the "situs" test are satisfied, requires the assumption of admiralty jurisdiction over all of the tort claims asserted in this case.

B. Admiralty Law and Recoverable Damages

Having determined that admiralty jurisdiction is properly invoked in this case, the court next must consider the damages that are recoverable by the personal injury and wrongful death plaintiffs. The court must

begin its analysis with the maxim that "with admiralty jurisdiction comes the application of substantive admiralty law." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *accord Penton v. Pompano Constr. Co.*, 976 F.2d 636, 639 n.6 (11th cir. 1992). Because admiralty law is essentially an amalgam of state and federal statutes and rules of decision, the court must continue its analysis by identifying the basic source – federal statute, federal rule of decision, state statues [sic], state rule of decision, or some combination of the foregoing – that provides the duty of care and remedy for the wrongs alleged in this case. *See Grubart v. Great Lakes Dredge & Dock Co.*, 130 L. Ed. 2d 1024, 1030 (1995) (the exercise of admiralty jurisdiction "does not result in automatic displacement of state law"). The court shall begin its analysis with a discussion of the law applicable to the wrongful death cases.

1. The Wrongful Death of Non-Seafarers Under Admiralty Law

Under the Supreme Court's recent decision in *Yamaha Motor Corporation v. Calhoun*, 116 S. Ct. 619 (1996), it is clear that this court must apply Alabama's wrongful death statute as surrogate admiralty law in determining the wrongful death beneficiaries and the damages that are recoverable by them. In that case, the Court considered whether the rights of the survivors of a minor non-seafarer killed in a recreational boating accident within Puerto Rican territorial waters were to be determined under the general maritime law or state wrongful death law.

In addressing the issue, the Court traced the development of maritime wrongful death law through *Moragne v. States Line Marine*, 398 U.S. 375 (1970), *Id.* at 623-25. Then, confining its "inquiry to the modest question whether it was *Moragne*'s design to terminate recourse to state remedies when nonseafarers meet death in territorial waters," *Id.* at 626 n.8; *see also Id.* at 625 n.7, The Court addressed Yamaha's contention that the general maritime wrongful death remedy recognized in *Moragne* should apply. *Id.* at 625-29.

Seizing on Yamaha's argument that *Moragne* established a uniform federal maritime remedy for all deaths occurring within territorial waters to the exclusion of all state law remedies, the Court observed that *Moragne* sought to achieve the uniform vindication of federal policies, but only with respect to the matters that it examined. *Id.* at 627. The Court noted that *Moragne* had not overruled the rule of *The Harrisburg* out of concern with excessive awards in state wrongful death cases or because variations in state law remedies "threatened to interfere with the harmonious operation of maritime law." *Id.* at 626. Rather, *Moragne* was narrowly concerned with the unavailability of unseaworthiness, a "distinctly maritime substantive concept," *id.* at 627, as a basis of liability under Florida's wrongful death statute. Ultimately, the Court declared, *Moragne* "centered on the extension of relief, not on the contraction of remedies," *Id.* at 627, and " 'showed no hostility to concurrent application of state wrongful death statutes,' " *Id.* at 628 (*quoting Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 641 (3d Cir. 1994).

> The *Moragne* cause of action was in many respects a gap-filling measure to ensure that

> seamen (and their survivors) would all be treated alike. The 'humane and liberal' purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy. 40 F.3d, at 641-642 (citation omitted).

The Court, thus, concluded that *Moragne* did not bar the application of state statutes to the case at hand. In so ruling, it stated:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is we have generally recognized, no cause for enlargement of the damages statutorily provided. . . . But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters. . . . There is, however, a relevant congressional disposition. Section [767] of DOHSA states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." . . . This statement, by its terms, simply stops DOHSA from displacing state law in territorial waters. . . . *Taking into account what Congress sought to achieve, we preserve the application of state statutes to deaths within territorial waters.* (Emphasis added.)
>
> * * *
>
> For the reasons stated, we hold that the damages available for the jet ski death of

> Natalie Calhoun are properly governed by state law. . . .

Id. at 628-29.

Alabama has two wrongful death statutes, one applicable to the deaths of minors, *see* Ala. Code § 6-5-391, the other applicable to the deaths of adults, see Ala. Code § 6-5-410. As uniformly interpreted by Alabama courts, each authorizes the recovery of punitive damages only, *see, e.g., King v. National Spa & Pool Institute, Inc.*, 607 So. 2d 1241, 1246 (Ala. 1992), and punitive damages may be awarded upon a showing of simple negligence. Also as uniformly interpreted by Alabama courts, the statute does not permit the apportionment of fault and damages among joint tortfeasors, *see, e.g., Lemond Constr. Co. v. Wheeler*, 1995 WL 577003, *6 (Ala., 1995), *cert. denied*, 64 U.S.L.W. 3469 (Feb. 26, 1996). Admiralty law authorizes punitive damages, if at all, only upon a showing of "lawless misconduct" amounting to "gross and wanton outrage," *see The Amiable Nancy*, 16 U.S. 546 (1818), and requires a determination of comparative fault among tortfeasors. *See McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994). The defendants, principally CSX and Amtrak, argue that these differences between admiralty law and the Alabama statute are so great that the Alabama statute should be deemed displaced by the *Moragne* remedy.

The court disagrees. Certainly, when ruling, the *Calhoun* Court clearly understood that the application of state wrongful death schemes to deaths occurring within territorial waters would introduce myriad inconsistencies into the law of maritime wrongful death. Specifically, the Court understood that there would be wide variations in

the damages recoverable under those schemes. Under prior Supreme Court precedent, the Court cautioned that state statutory schemes must be applied *in toto, see The Tungus v. Skovgaard*, 358 U.S. 588, 592-93 (1959); *Hess v. United States*, 361 U.S. 314, 320 (1960); thus, a maritime court is not free to pick and choose some portions of a state scheme and discard others. Considering that the Court approved of damages variations among state schemes in *Calhoun*, it is reasonable to assume, from the Court's earlier decisions in *The Tungus* and *Hess* that the Court thereby approved of other provisions of state schemes that might otherwise be contrary to federal admiralty law. Since, under *Calhoun*, Alabama's damages scheme is due to be applied to this case, the court concludes that the entire statute is due to be applied, as is, as well.[21]

The court's decision is buttressed by the latest decision of the 11th Circuit in *American Dredging v. Lambert*, 81 F.3d 127, (11th Cir. 1996), which concludes that state law governs wrongful death cases of non-seamen and non-maritime workers killed in territorial waters.

---

[21] Section 6-5-462 of the ALABAMA CODE permits an action brought for personal injuries to survive the death of the plaintiff from those injuries. That action is available, however, only if filed by the injured person prior to death. *See Jones v. DCH Health Care Authority*, 621 So. 2d 1322, 1323 (Ala. 1993). In this case, the decedents died almost instantaneously in the crash. Therefore, none filed an action for personal injuries prior to death, and no plaintiff can claim damages under Alabama's "survival of the existing cause of action" statute.

2. Personal Injury of Non-Seafarers Under Admiralty Law

The general maritime law determines standards of liability and available remedies in personal injury actions. *See Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560 (11th Cir 1991); *Everett v. Carnival Cruise Lines, Inc.*, 912 F.2d 1355 (11th Cir. 1990); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Frantz v. Brunswick Corp.*, 866 F. Supp. 527 (S.D. Ala. 1994). There is little dispute over the damages that are recoverable in a general maritime personal injury action. To the extent proven by the evidence and found by the trier of fact, the personal injury plaintiffs may recover for: (a) physical pain and suffering, *Crador v. Louisiana Dep't of Highways*, 625 F.2d 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); (b) loss of past earnings and impairment of future earnings capacity, *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir.), *reh'g*, 510 F.2d 234, *cert. denied*, 423 U.S. 839 (1975); *Vickers v. Tumey*, 290 F.2d 426 (5th Cir. 1961); (c) past and future medical and hospital expenses, *Martinez v. Star Fish & Oyster Co., Inc.*, 386 F. Supp. 560 (S.D. Ala. 1974); (d) mental anguish if accompanied by physical injury, *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989); and (e) prejudgment interest unless certain "peculiar circumstances" are present, *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984). From the undersigned's examination of admiralty law, particularly its consideration of the Eleventh Circuit's recent decision in *American Dredging Co. v. Lambert*, 81 F.3d 127 (11th Cir. 1996), there is no reason why the personal injury plaintiffs should not

also be permitted to recover nonpecuniary damages, including damages for loss of society and loss of consortium. Punitive damages, moreover, also shall be recoverable upon proof of "lawless misconduct" amounting to "gross and wanton outrage."

C. Miscellaneous

With respect to the cross-claims between WGN and CSX/Amtrak, the defendants agree that maritime rules of contribution and indemnity apply to this case assuming that admiralty jurisdiction is appropriate. They further appear to agree that the property damage claims by CSX and Amtrak against WGN also are governed by admiralty law.

To the extent claimed and proven by the evidence, CSX and Amtrak are entitled to recover from WGN compensation for their pecuniary losses arising from the occurrence. This recovery may include damages to the bridge and train plus other pecuniary losses, such as "established losses in revenues and increased expenses sustained during the time that the [bridge] was under repair" and "necessary and reasonable expenses for providing substitute passage and transfer" of its trains. *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971), *aff'd in part and rev'd in part on other grounds*, 480 F.2d 11 (5th Cir. 1973); *see also Delta Marine Drilling Co. v. M/V Baroid Ranger*, 454 F.2d 128, 130-31 (5th Cir. 1972) (drilling barge damages in collision with vessel was entitled to recover from vessel owner lost profits during period in which drilling barge was undergoing repairs); *Continental Oil Co. v. S.S. Electra*, 431 F.2d 391, 392-93 (5th Cir. 1970),

cert. denied, 401 U.S. 937 (1971) (plaintiff could recover lost profits from oil well when production was suspended for 130 days after well was hit by vessel); *State Road Dept. v. United States*, 78 F. Supp. 278, 281 (N.D. Fla. 1948) (re-routing costs during repairs of damaged route were recoverable).

Conclusion

In light of the foregoing, the court concludes that:

1. All of the claims asserted in this case, including those asserted by and between WGN, Odom, Stabler, CSX, and Amtrak, are governed by admiralty law;

2. With respect to the wrongful death plaintiffs, Alabama's wrongful death statute shall apply as surrogate or supplemental admiralty law. The wrongful death plaintiffs, therefore, shall be entitled to seek, the recovery of punitive damages only.

3. The personal injury plaintiffs shall be entitled to recover the following damages, to the extent claimed, proven by the evidence, and found by the trier of fact:

a. physical pain and suffering,

b. loss of past earnings and impairment of future earnings capacity,

c. past and future medical and hospital expenses,

d. mental anguish if accompanied by physical injury,

e. damages for loss of consortium and/or loss of society;

f. punitive damages; and

g. prejudgment interest unless certain "peculiar circumstances" are present.

4. With respect to their property damage claims against WGN, CSX and Amtrak shall be entitled to recover compensation for their pecuniary losses arising from the occurrence, to the extent claimed, proven by the evidence, and found by the trier of fact.

5. Upon application of any party, the court will grant an interlocutory appeal on any or all of the issues addressed in this opinion. The application must be filed no later than the close of business on July 8, 1996, and must be accompanied by proposed statements as to the scope of the interlocutory appeal.

By separate order, the court shall rule on all motions that were held in abeyance pending a ruling on the applicable law.

DONE this 26 day of June, 1996.

/s/ Richard W. Vollmer, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

PART I

POST-*MILES* FEDERAL COURT OF APPEALS CASES

SEAMAN / NO RECOVERY

Guevara v. Maritime Overseas Corporation, 59 F.3d 1496 (5th Cir. 1995): Injured seaman sought recovery under Jones Act. Punitive damages are no longer available in cases of willful nonpayment of maintenance and cure under the general maritime law.

Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995): Injured seaman brought action under general maritime law and Jones Act. Punitive damages are not available in cases of willful failure to pay or investigate maintenance and cure claims. Citing *Miles* for proposition that damages recoverable on a general maritime cause of action do not include losses not provided for in the uniform plan of maritime tort law provided by Congress.

Horsley v. Mobil Oil Corporation, 15 F.3d 200 (1st Cir. 1994): Injured seaman brought action against employer under general maritime law, Jones Act and unseaworthiness. All actions for wrongful death of a seaman are controlled by the uniform principle of *Miles*, whereby damages are limited to pecuniary loss.

Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993): Maritime wrongful death action by multiple seaman. Court discusses that nonpecuniary damages have a long history of acceptance in general maritime law before *Miles* held them unavailable in a

seaman's wrongful death action. Thus held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman.

SEAMAN / RECOVERY

No cases reported.

NONSEAMAN / NO RECOVERY

Amtrack "Sunset Limited" Train Crash v. Warrior & Gulf, 121 F.3d 1421 (11th Cir. 1997): Claims by nonseafarers for personal injury and death. Court held that general maritime law precludes the claims of punitive damages under general maritime law for personal injury plaintiffs, while the death plaintiffs may seek all available remedies under state law (including punitive damages).

Benny Chan et al. v. Society Expeditions, 39 F.3d 1398 (9th Cir. 1994): Nonseamen injuries. Claims for nonpecuniary damages of loss of society and loss of consortium. Court held that "loss of consortium and loss of society damages are not available . . . under the general maritime law . . . serves the goal of uniformity . . . emphasized in *Miles.*"

Nichols et al. v. Petroleum Helicopters, 17 F.3d 119 (5th Cir. 1994): Nonseaman claim for personal injuries and accompanying claim by spouse for loss of consortium. Court held that loss of consortium claims are not cognizable under general maritime law.

Walker et al. v. Braus, 995 F.2d 77 (5th Cir. 1993): Survivors' claims in wrongful death action. Court stated that allowing the survivor to "recover loss of consortium damages would directly contradict the policy of uniformity emphasized and relied on by the Court in *Miles;* and with out expressly so deciding at this time, we acknowledge the strength of the argument that damages for loss of society may no longer be permitted in a general maritime wrongful death action involving the operator of a fishing boat.

Murray et al. v. Anthony J. Bertucci Construction Co., 958 F.2d 127 (5th Cir. 1992): Nonseaman personal injury action. Court held that " . . . *Miles,* properly extended, precludes an injured seaman's spouse from recovering loss of society."

NONSEAMAN / RECOVERY

American Dredging Co. v. Lambert, 81 F.3d 127 (11th Cir. 1996): Nonseaman personal injury and death claim. Nonpecuniary damages could be recovered under Florida law because no federal statute or common law precedent precluded the recovery of pecuniary damages.

Randall et al, v. Chevron, 13 F.3d 888 (5th Cir. 1994): Survivor's claim for nonseaman's (longshoreman) death in state territorial waters for loss of society. Court held that *Miles* did not extend to this case and that *Gaudet* controlled. Thus the survivors were entitled to recover loss of society damages.

PART II

POST-*MILES* DISTRICT COURT CASES

SEAMAN – NO RECOVERY

Matter of the Complaint of L.L.P. & D. Marine, Inc., 1997 WL 590801 (E.D. La. 1997): Survivor action including claims for punitive damages and loss of nurture. Court found that punitive damages are not available under either the Jones Act or general maritime law citing *Miles*. The loss of nurture claim was dismissed because the motion to dismiss was unopposed.

Williams v. Texaco, Inc., 1997 WL 250009, 1997 A.M.C.2371 (E.D. La. 1997): Seaman claim for personal injury and punitive damages. Court held that, "the clear import of *Miles* and *Guevara* are that the only damages recoverable under the general maritime law are pecuniary losses."

In the Matter of Cropwell Leasing, et al., 1996 U.S. Dist. LEXIS 18202 (E.D. La. 1996): Seaman's claim for personal injuries under general maritime law and Jones Act also seeking punitive damages. Court recognized that nonpecuniary damages are not allowed either under the Jones Act or general maritime law.

Hollinger v. Kirby Tankships, Inc., 910 F.Supp. 571 (S.D. Ala. 1996): Seaman's claim for personal injuries under general maritime law and Jones Act. Sought damages including punitive damages under general maritime law and for willful failure to provide maintenance and cure. Court held that "punitive damages are unavailable in general maritime law post-*Miles*." Also recognized that punitive damages

are unavailable in maintenance and cure actions per *Miles*.

Charles R. Collazo et al v. Owens-Corning Fiberglass Corp., 1995 U.S. Dist. LEXIS 1796 (E.D. Pa. 1995): Seaman claim for personal injuries. Spouse claimed loss of consortium. Court, citing *Miles*, held that under the general maritime law or Jones Act, loss of consortium is not compensable.

Clancy v. Mobil Oil Corporation, 906 F.Supp. 42 (D. Mass. 1995): Seaman in personal injury action. Court held punitive damages are not allowable under general maritime law and that loss of consortium is not available under general maritime law or state law.

Brown v. the F/V LADY ALICE, 1994 WL 774534 (D. Haw. 1994): Seaman injured aboard vessel. Punitive damages are not available under general maritime law. Reasoning – *Miles* excludes recovery for nonpecuniary damages under general maritime law.

Tate v. Zapata Gulf Marine Construction, 1993 WL 346190 (E.D. La. 1993): Seaman: Injured seaman sued owner of tug and owner of barge claiming he fell while climbing ladder aboard tug en route to deck of barge. Could not claim for punitive damages based on negligence or unseaworthiness but claim for punitive damages for failure to provide maintenance and cure could be maintained.

Dopson v. Wilrig, 1993 WL 330026 (E.D. La. 1993): Seaman – Miles mandates that seamen, regardless of what theory of recovery, negligence or unseaworthiness,

under which they sue, cannot recover punitive damages.

Horsley v. Mobil Oil Corporation, 825 F.Supp. 424 (D. Mass. 1993): *Miles* precludes loss of consortium and punitive damage claims in injury actions by Jones Act seamen under general maritime law. Wife's state law loss of consortium claims dismissed as patently inconsistent with the federal maritime law's express disavowal of such claims.

Boykin v. Bergesen D.Y., 822 F.Supp 324 (E.D. Va. 1993): Seaman – Suit on behalf of master of vessel killed when a hold containing coal exploded against shipper of coal. DOHSA claim and general maritime law survival claim for compensatory and punitive damages. No recovery of punitive damages based on a general maritime law survival claim.

Knighton v. Tidex Marine, Inc., 1993 WL 53005 (E.D. La. 1993): Seaman's claim for punitive damages and unseaworthiness – since *Miles,* remedy of punitive damages unavailable under the general maritime law in a tort action.

Ortega v. Oceantrawl, Inc., 822 F.Supp.621, 1993 A.M.C. 902 (D. Alaska 1992): Seaman's claim for punitive damages, unseaworthiness and Jones Act negligence – punitive damages unavailable for Jones Act and unseaworthiness claims under general maritime law in light of *Miles.*

Jackson v. Unisea, Inc., 824 F.Supp. 894 (D. Alaska, 1992): Jones Act seaman's claim for punitive damages is "nonpecuniary" and therefore not recoverable under

the Jones Act, citing *Miles*. Under general maritime law, punitive damages are also precluded when claim tied to statutory claim because to allow such recovery would sanction more expansive remedies than Congress intended.

Anderson v. Texaco, Inc., 797 F.Supp. 531, 1993 A.M.C. 1319 (E.D. La. 1992): Jones Act seaman could not recover punitive damages for personal injury claim because claims for punitive damages were foreclosed by *Miles* and that Jones Act limits recovery to pecuniary loss. Doctrinal underpinnings of *Miles* limits the remedies available under all general maritime law theories to those the Jones Act allows.

Bayes v. OPI Int'l Inc., 1994 A.M.C. 286 (S.D. Tex. 1992): Seaman's claim for punitive damages arising from personal injury claim under the Jones Act and general maritime law dismissed because in *Miles*, the Supreme Court sought to promote an uniform rule applying to all seamen, and refused to permit recovery of punitive damages under general maritime law because such remedies were unavailable under the Jones Act, since punitive damages are nonpecuniary in nature.

Petition of Cleveland Tankers, Inc., 791 F.Supp. 679 (E.D. Mich. 1992): Seaman's claim for punitive damages – *Miles* bars seaman's punitive damages claim under the general maritime law because the central tenet of *Miles* is that where Congress has legislated in an area of maritime law (Jones Act), case-created remedies must be uniform with such legislation.

Howard v. Atlantic Pacific Marine Corp., 1992 WL 55487 (E.D. La. 1992): Seaman's claim – *Miles'* policy of uniformity of damages under the Jones Act, DOHSA, and the general maritime law precludes recovery of punitive damages for unseaworthiness or negligence.

La Voie v. Kualoa Ranch, 797 F.Supp. 827, 1992 A.M.C. 1493 (D. Hawaii 1992): Seaman's claim for punitive damages arising from personal injury claim – seaman was not entitled to recover punitive damages under general maritime law because Jones Act does not allow recovery for punitive damages, citing *Miles*.

In re Waterman Steamship Corp., 780 F.Supp. 1093, 1992 A.M.C. 1035 (E.D. La. 1992): Seaman's claim – punitive damages unavailable under the Jones Act or general maritime law because they are nonpecuniary in nature, citing *Miles*.

Complaint of Aleutian Enterprise, Ltd., 777 F.Supp. 793 (W.D. Wash. 1991): Seaman's claim – punitive damages denied under general maritime law because it would be inconsistent with the judiciary's place in the constitutional scheme to sanction more expansive remedies in a judicially-created cause of action than Congres has allowed in causes involving negligence (Jones Act).

Davis v. Penrod Drilling Corp., 1991 WL 264541 (E.D. La. 1991): Seaman's claim – punitive damages unavailable on the basis of *Miles*.

Stoufflet v. Apex Towing Co., Inc., 1991 WL 194759 (E.D. La. 1991): Seaman's claim – punitive damages disallowed since *Miles* in a Jones Act or general maritime law claim.

Duplantis v. Texaco, Inc., 771 F.Supp. 787 (E.D. La. 1991): Seaman's general maritime law claim for negligence arising not from unseaworthiness, but on account of defendant's alleged willful and wanton failure to remove debris from work area, contributing to injury – punitive damages denied in all general maritime law claims, however, under *Miles*, because such claims are nonpecuniary.

Brumfield v. Zapata Gulf Marine Corp., 1991 WL 174818 (E.D. La. 1991): Seaman's claim – following *Miles*, punitive damages now unavailable under the Jones Act or general maritime law.

Rowan v. Badeaux, 1991 WL 175541 (E.D. La. 1991): Seaman could not recover punitive damages arising from shipowner's willful and wanton disregard of his safety, citing *Miles*.

Haltom v. Lykes Bros. Steamship Co., 771 F.Supp. 179, 1992 A.M.C. 1334 (E.D. Tex. 1991): Seaman: Widow's action seeking punitive damages – punitive damages not available under the Jones Act or general maritime law, citing *Miles*. Since *Miles*, no nonpecuniary damages may be recovered under the Jones Act, general maritime law, or DOHSA.

Donaghey v. Ocean Drilling & Exploration Co., 1992 A.M.C. 528 (E.D. La. 1991): Seaman's claim – punitive damages under Jones Act and general maritime law dismissed on basis of *Miles*.

Rollins v. Peterson Builders, Inc., 761 F.Supp. 943, 1991 A.M.C. 2286 (D.R.I. 1991): Parents of decedent seaman denied punitive damages under the Jones Act and DOHSA. Punitive damages also are not available under the general maritime law when such claim is joined with a Jones Act claim, citing *Miles*.

In re Mardoc Asbestos Case Clusters 1,2,5, and 6, 768 F.Supp. 595, 1991 A.M.C. 1610 (E.D. Mich. 1991): Punitive damages are unavailable under *Miles* in a Jones Act or general maritime law action.

Rollins v. Peterson Builders, Inc., 761 F.Supp.918(D.R.I. 1990) motion for reconsideration Jan 10, 1991. Survival action for seaman's death under both Jones Act and general maritime law. On motion for reconsideration based on *Miles*, court invalidates previous holding and holds that a non-dependent parent may NOT recover for loss of society (nonpecuniary damage) in a general maritime law wrongful death action.

SEAMAN / RECOVERY

Trident Marine, Inc. et al. v. M/V ATTICOS, 1995 U.S. Dist. LEXIS 2567 (E.D. La. 1995): Seaman killed in maritime collision. Spouse claimed compensatory and punitive damages. After lengthy historical review, court held that *Miles* should be confined to general

maritime law wrongful death claims for loss of society only. Specifically that *Miles* does not apply to punitive damages. Thus punitive damage claim, in this case, was allowed to go forward.

Sexton v. American Steamship Company, 843 F.Supp. 1157 (E.D. Mich. 1994): Seaman against non-employer – Family members of a deceased Jones Act seaman may recover nonpecuniary damages in a wrongful death action under the general maritime law from a defendant who was not his employer. *Miles* principles do not control here against a non-employer.

Kartofilis v. Louis Dreyfus Corporation, 1993 WL 483576 (E.D. La. 1993): Seaman – Wife and children of Jones Act seaman killed in explosion onboard vessel against non-employer. Court held that plaintiffs have no claim for loss of consortium and society under the general maritime law since *Miles*. However, allowing punitive damage claims against non-employer grounded in negligence not based on unseaworthiness is not contrary to *Miles*.

Zoila-Ortego v. B.J. Titan Services Company, 751 F.Supp 633, 1991 A.M.C. 1205 (E.D. La. 1991): Seaman: Surviving barge-worker's mother claims in both federal (Jones Act, general maritime law and State law) and state court (identical claims) – After settlement and dismissal of federal suit, she sought punitive damages under state law. – Court allowed removal to state court to hear punitive damage claim.

NONSEAMAN / NO RECOVERY

O'Hara v. Celebrity Cruises, Inc. 1997 WL 634246 (S.D.N.Y. 1997): Nonseaman passenger personal injury action including claim for punitive damages. Citing *Miles* and *Wahlstrom*, the court held that "punitive damage claims are not available in personal injury negligence cases brought under general maritime law."

Adler, et al. v. Royal Cruise Line, LTD., 1996 WL 458799, 1996 A.M.C. 1349 (N.D. Ca. 1996): Nonseaman cruise passenger claims for personal injury, loss of consortium and punitive damages. Court denied the application of punitive damages, citing *Miles* and further that damages for loss of consortium were not recoverable in cases involving injuries to passengers outside territorial waters, citing *Chan*. (Note that in *Chan*, the 9th Cir. denied nonpecuniary damages based on the reasoning in *Miles*.)

Delores Bardwell, et al. v. George G. Sharp, Inc. et al., 1995 U.S. Dist LEXIS 12624 (E.D. La. 1995): Nonseamen/ Longshoremen killed. Survivors claims included loss of society and punitive damages under general maritime law. Per *Gaudet*, court held that in cases where longshoremen are killed or injured in territorial waters, their heirs may recover for loss of society (nonpecuniary damage). However, punitive damage claims under the general maritime law are no longer available.

Douglas Gisclair et al. v. Texaco Inc. et al., 1995 U.S. Dist. LEXIS 6835 (E.D. La. 1995): Nonseaman injury claim under general maritime law. Spouse claim for loss of society. Court held that *Gaudet* (allowing spouses of

longshoremen to claim loss of society damages) is not applicable to nonseaman/nonlongshoreman cases. *Miles,* thus controls and the general maritime law disallows action for loss of society.

Cochran v. A/H Battery Associates, 909 F. Supp. 911, 1996 A.M.C. 911 (S.D.N.Y. 1995): Nonseaman/Ferry passenger injured in allision [sic] with dock brought action against ferry owners. Court concluded that *Miles* bars plaintiff's claim for punitive damages.

Bardwell v. George G. Sharp, Inc., 1995 WL 517120 (E.D. La. 1995): Heirs of longshoreman killed or injured in territorial waters may recover for loss of society. Punitive damages claims under the general maritime law will be struck because they are no longer supported by 5th Cir. Law.

Frantz v. Brunswick Corporation, 866 F. Supp. 527 (S.D. Ala. 1994): Owner of motor boat vs. manufacturer for personal injuries – punitive damages are generally unavailable in general maritime law post-*Miles.*

Brown v. Tidewater Inc., 1994 WL 421352 (E.D. La. 1994): Seaman – Suit by administratrix of estate of seaman who died on vessel from heart attack under Jones Act, DOHSA and general maritime law. Neither Jones Act nor DOHSA allow recovery for loss of consortium. *Miles.* Reserves ruling on availability of punitive damages.

Earhart v. Chevron U.S.A. Inc, 852 F. Supp. 515 (E.D. La. 1993): Nonseaman – Fishermen injured when their fishing vessel struck an underwater object. Punitive

damages may not be recovered in this general maritime law case under *Miles*.

Ellison v. Messerschmitt-Bolkow-Blohm, 807 F.Supp. 39 (E.D. Tex. 1992): Nonseaman: Survivor of helicopter pilot who was killed on High Seas brought suit under DOHSA, general maritime law, and Texas survival statute. Punitive damages are nonpecuniary and therefore not recoverable under general maritime law in light of *Miles*. Punitive damages likewise unrecoverable under DOHSA. Since Congress did not enact a maritime survival statute, and the Supreme Court in *Miles* declined to adopt a Federal Survival action, punitive damages could be pursued under the Texas survival statute, however.

NONSEAMAN / RECOVERY

Patricia Krummel, et al. v. Bonbardier Corp, et al., 1997 U.S. Dist. LEXIS 481 (E.D. La. 1997): Nonseaman personal watercraft operator was injured. Wife claimed nonpecuniary damages (loss of service, society and companionship). Court held that federal maritime law does not supplement state remedies, therefore wife's claim for nonpecuniary damages under state law may be maintained. Reasoning: *Yamaha* and that Congress has not prescribed any specific remedies for personal injuries to nonseafarers in state territorial waters.

Paul Rosen and Wendy Rosen v. Jacob Brodie, 1995 U.S. Dist. LEXIS 9410 (E.D. Penn. 1995): Nonseaman claims for personal injury and concurrent claim by wife for loss of consortium (nonpecuniary damages). Court

allowed claim for consortium reasoning that *Miles* does not extend to that of a nonseaman injured in territorial waters.

Bernice M. Saunders et al. v. Cunard Line Limited, 1995 U.S. Dist. LEXIS 7466 (S.D.N.Y. 1995): Nonseaman/passenger injury. Claim by spouse for loss of society. Court allowed nonpecuniary damage claim for loss of society to be maintained based on *Lockerbie* where 2nd Cir. held that "general maritime law cases that are not bound by a statutory restriction . . . allow recovery for loss of society."

Newhouse and Nuffer v. United States and Masterson, 844 F.Supp. 1389 (D. Nev. 1994): Boat passenger and parents of deceased boat passenger v. boat driver and U.S. as owner of other boat – collision – future economic loss in a general maritime survival action is precluded by *Miles*. *Miles* does NOT preclude recovery of pre-death pain and suffering, punitive damages or prejudgment interest in a general maritime survival action.

Van Aernam v. Bass Enterprises Co., 1994 WL 90406 (E.D. La. 1994): Non-Jones Act seaman can recover punitive and other nonpecuniary damages in boating accident with submerged gas pipelines – *Miles* has no effect upon a claim other than one brought by a Jones Act seaman against his employer.

In the Matter of American Dredging Company, 873 F.Supp. 1539 (S.D. Fla. 1994): Limitation of liability proceeding in connection with fatal accident from pleasure boat alliding [sic] with dredge line in state territorial waters. Dependents of nonseamen decedents who

die in territorial waters are allowed to recover non-pecuniary damages in Moragne causes of action. *Miles* does not explicitly apply to this case where the decedents were nonseamen. "It is inconsistent with federal maritime law to prohibit damages . . . when there is no explicit statutory or federal common law prohibition on such damages." *Garner v. Dravo Basic Materials Co.*, 768 F.Supp. 192, 195 (S.D. W.Va. 1991).

Powers v. Bayliner Marine Corporation, 855 F.Supp. 199 (W.D. Mich. 1994): Nonseaman – Representatives of estates of passengers vs. manufacturer of sailboat which capsized. Wrongful death and personal injury claims under general maritime law. If *Miles* does not preclude recovery for loss of society under general maritime law with nonseaman and no claim against employer then it follows that such damages are recoverable now to the same extent they were recoverable prior to *Miles*. Court concludes plaintiffs may, notwithstanding *Miles*, recover punitive damages on the claims asserted. [CEH 153 F.R.D. 491; *Newhouse*, 844 F.Supp at 1394; *Mussa*, 802 F.Supp. 84; *Anderson*, 797 F.Supp. 531; *DuPlantis*, 771 F.Supp. 787]

In re Morehead Marine, 844 F.Supp. 1193 (S.D. Ohio 1994): Nonseaman – Survivors of nonseaman decedents on pleasure craft which collided with a tow pushed by defendant's vessel seeking pecuniary and non-pecuniary damages including punitive damages, loss of society, future earnings and support. *Miles* does not control. HELD: Under general maritime law, as there exists no statutory provision to the contrary, plaintiffs are entitled to nonpecuniary damages,

including loss of society, lost future income and punitive damages. See *Gaudet*.

Bergeron v. Atlantic Pacific Marine, 899 F.Supp. 1544 (W.D. La. 1993): *Sieracki* seaman injured while on a jack-up within state territorial waters permitted to bring unseaworthiness claim and allowed to maintain his claim for punitive damages and wife allowed to maintain her claim for loss of consortium.

APPENDIX E

Ramon Abadin
Daniel Abel
Joel F. Alexander
Phillip B. Allen
John L. Anderson
W. E. Andrews, III
Joseph and Alie Anello
Lisa Anne Appleyard
Christopher M. Arebalo
J. Clark Aristei
Armbrecht, Jackson, DeMony, Crowe, Holmes & Reeves, L.L.C.
Conrad P. Armbrecht
Gwendolyn Arney
Grover E. Asmus, II
Atlanta, Knoxville & Northern Railway Company
Augusta and Summerville Railroad Company
Christine Nicolai Huet de Bacellar
David A. Bagwell
Alfred Ball Sr.
Baltimore and Cumberland Valley Rail Road Extension Company
Frank Barbaro
Don Barret
Patrick Barrett
Beaver Street Tower Company
Belt Railway Company of Chicago
Berglund & Johnson
Edward G. Bibb
Birdsall, Rodriguez & Kehoe
Boca Bay Properties, Inc.
Philip Bohrer, Esq. – Ramsey, Kolderitz & Bohrer
Sarah Alison Bourne
Clifford C. Brady
The Branch Law Firm
Turner W. Branch

Gregory B. Breedlove
Richard F. Brock
Douglas L. Brown
Scott G. Brown
John J. Buckley, Jr.
Thomas Bueno
Buffalo, Rochester and Pittsburgh Railroad Company
Balhar Singh Bujarh
S. Greg Burge
Peter F. Burns
Dianne Cabral
CSX Transportation, Inc.
Jennifer Camarena
Martha Camerena
Nedra Camarena
Dirk Capel
Capitelli & Wicker
Carnes, Wamsley, Waid & Hyman, P.C.
The Carrollton Railroad
Joseph D. Caspolich
Max Cassady, Esq. – Burns, Cunningham & Mackey, P.C.
Rodney R. Cate
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina
Central Transfer Railway and Storage Company
Andrea Blair Chancey
Chatham Terminal Company
Chicago Union Station Company – Amtrak Affiliate
Thomas D. Childs
Angeline Christy
Cincinnati Inter-Terminal Railroad Company
Andrew T. Citrin, Esq. – Cunningham, Bounds, et al
R. Jack Clapp
R. Jack Clapp & Associates
Calvin Clay
Coale, Allen & Van Sustern
John P. Coale

Stephen R. Copeland
Corboy & Demetrio, P.C.
Perta Corro
Frederick C. Creasy, Jr., Esq.
Rae M. Crowe
CSX Capital Management, Inc.
CSX Corporation
CSX Realty Development Corporation
CSX Resources, Inc. – Georgetown
CSX Tower II Properties, Inc.
K. Michael Cullen
J. Michael Culler, Esq. – Troutman, Williams, Irvin, Green & Helms
Cunningham, Bounds, Yance, Crowder & Brown
Cybernetics & Systems, Inc.
Dayton and Michigan Railroad Company
Edward A. Dean
Albert C. DeFelice, Sr.
Michael K. Demetrio
Thomas A. Demetrio, Esq. – Corboy & Demetrio
Marshall J. DeMouy
Douglas Desjardins, Esq. – R. Jack Clapp & Associates
Elizabeth Diener
Patrick F. Dixon
Michael Dopheide
Michelle Dotting
G. Whit Drake, Esq. – Emond & Vines
Emond & Vines
Donald E. Earnshaw, Esq.
Energy Resources and Logistics, Inc.
ER&L-Thames, Inc.
R. Graham Esdale
Timothy J. Falcon, Esq.
Gary Lee Farmer
Fine, Farkash & Parlapiano, P.A.
Joseph Dayton Foley, Jr.
Dabney Bragg Foshee

Richard W. Franklin
Fruit Growers Express Company
Julie Furano
P. Vincent Gaddy
Gainesville Midland Railroad Company
Ricardo V. Galvan
Gaston & Gaston
Ian F. Gaston
Gauthier & Murphy
Wendell Gauthier
Gemetals Distribution Services Company
Duane A. Graham
Frank H. Granito, III
Claudia Gray
Leon Gray
Larry V. Green
Green Real Estate Company
C. L., Gruenewald
Janet Gullixson
Joyce A. Hall
Eric Hampton
Hand Arendall, L.L.C.
Neil Hanley
Harborside at Boca Bay Development Corporation
Hare, Wynn, Newell & Newton
William B. Harvey
Edward G. Hawkins
Priscilla E. Haystead
Susan Healy
Cecil Heater
Charles Helms, Sr.
Verona Helms
Helmsing, Lyons, Sims & Leach
Heninger, Burge & Vargo
Stephen D. Heninger
Esteban Hernandez, Jr.
Estefan Hernandez

Ronald Hernandez
Vivian Hernandez
Murray G. Hill
Andrew Hollis
L. Andrew Hollis, Jr.
Wm. Steele Homman II
Broox G. Holmes
Broox G. Holmes, Jr.
Billy Ray Holzworth
David E. Hudgens
Home Avenue Railroad Company
Hooker Core, Inc.
Hooker Homes, Inc.
Hooker Silver, Inc.
Hooker Tin, Inc.
Heidi K. Hubbard, Esq. – Williams & Connolly
Donnie Sue Hughes
J. Donald Hughes
William Hughes
Joe M. Inabnett
Paul B. Irvin
Timothy A. Ita, Esq. – R. Jack Clapp & Associates
Jackson, Taylor & Martino
Martin E. Jackson
Jeffrey P. Jacobs
James Center Development Company
James Center Development Company – Richmond
Ezra D. Jeffrey
Jones & Granger
Charley P. Jones
James A. Jones, Jr.
David O'Neal Jordan
Barry Kalmanson
Kananack, Murgatroyd, Baum & Hedlund
Judith Kavanagh
Kathryn Kavanagh
Patrick G. Kehoe, Jr.

Kerrigan, Estess, Rankin & McLeod
Robert G. Kerrigan
Arthur A. Kline
Joseph O. Kulakowski, Esq.
Lake Erie and Detroit River Railway Company
Lakefront Dock and Railroad Terminal Company
Lakeland City Center, Inc.
Langston, Frazer, Dockins & Sweet
Yusef K. Lasana
Isabelle Laxton
Judith Leigh
Mary Elle L. Leonard
Ralph Leonard
Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A.
Martin H. Levin
L & N Investment Corporation
L & N Development Corporation
Laurel M. Lofland
Thomas L. Lorenzi, Esq. – Lorenzi, Sanchez & Rosteet
Charles & Maryb Lounders
Esther Lucius
Peter S. Mackey
John Blair Main
Lorena & Gus Maloney
Julia Marrero
Steven A. Martino
Brian P. McCarthy, Esq. – Hand Arendall, L.L.C.
Jerry A McDowell
Annie Belle McKee
Bruce McKee – Hare, Wynn, Newell & Newton
Kathleen Anne McMahon
Heather McNab
Coleman F. Meador
Metals Distribution Services, Inc.
M. Kathleen Miller
Douglas J. Mims, Jr.

Mobile Bay Woodchip Center
Mobile River Terminal Company
Mohoning State Line Railroad Company
Adam P. Morel
Robert J. Mullican
Raymond Sierra Murillo
Edgar W. Muse
National Railroad Passenger Corporation d/b/a Amtrak
Neville Island Terminal Railway Company
Anna Belle Newman
Carol Ann Newton
David Newton
Heather Ann Jones Newton
Nona Barnes, Inc.
Norfolk and Portsmouth Belt Line Railroad Company
North Bank Development Company
North Charleston Terminal Company
Mary O'Donovan
Reuben D. O'Donovan
Willie C. Odom
Osur & Kellough
Ian G. Osur
Timothy David Palmer
Michael Papantonio, Esq. – Levin, Middlebrooks, et al
Alan R. Parlapiano
E. B. Peebles III
Sirote & Permutt
Barbara Petrie
R. Edward Pfiester, Jr.
Thomas H. Pierce
Piggot & Ward
Pittman, Hooks, Marsh, Dutton & Hollis
Carl Poole
Laura Powell
Thomas Powell
Pratt, Bradford & Tobin, P.S.
Fred G. Prichason

Melanie Procaccini
RDC Projects, Inc.
Raceland Car Corporation
Stephen D. Raber, Esq. – Williams & Connolly
Donald C. Radcliff
Rail Wagons, Inc.
Ramsey, Koederitz & Bohrer
Robert S. Ramsey
Real Estate and Improvement Company of Baltimore City
W. Boyd Reeves, Esq. – Armbrecht, Jackson, DeMouy, et al
Allen C. Renz, Jr.
Richmond, Fredericksburg & Potomac Railway Company
W. Boyd Reeves
Edith Rickard
John Rickard
Michael D. Riley
John L. Roberts
James E. Robertson, Jr.
Richard R. Rosenthal
Sidney J. Rosteet, Esq. – Lorenzi, Sanchez & Rosteet
Timothy D. Ryan
Larry A. Sackey
David J. Sales, Esq. - Searcy, Denney, Scarola & Shipley, P.A.
John Scarola
Robert Schmidt
Seaboard Coast Line Railway Supplies, Inc.
Gregg H. Seiler
Cheryl M. Shaw
Kirk C. Shaw
Cheryl Joanne Sidebotham
Carolyn Bush Simpson
George F. Simpson
Larry U. Simms
Sirote & Permutt
Betty Ruth Skelton

David Skelton
James Dale Smith
Thomas L. Smith
Southern International Service Company
Moira Jane Speake
Speiser, Drause, Madole & Nolan
Angela L. Springer
Andrew Stabler
Douglas B. Stalley
Staten Island Railroad Corporation
Staten Island – Arlington, Inc.
Dennis C. Sweet, III
John E. Taube
Kelli D. Taylor, Esq. – Cunningham, Bounds, et al
Terminal Railroad Association of St. Louis
Terminal Realty Baltimore Co.
Terminal Realty Baltimore Second Co.
Donna Thompson
Dwight Thompson
James J. Thompson
Joan Thompson
Randle D. Thompson, Esq. – Kerrigan, Estess, Rankin & McLeod
Ray M. Thompson
Three Rivers Railway Company
Toledo Ore Railroad Company
Transcontinental Terminals, Inc.
TransKentucky Transportation Railroad, Inc.
Transtar Holdings, L.P.
Transtar, Inc.
E. Kay Trout
Troutman, William, Irvin, Green & Helms
TTX Company
USX Corporation
John W. Vardaman
Lawrence N. Veite
Lanny S. Vines, Esq. – Emond & Vines

Hon. Richard W. Vollmer
Norman E. Waldrop, Jr.
Corwin G. Walks
George Augustus Walks
Wanda Walks
Warrior & Gulf Navigation Company
Washington Terminal Company – Amtrak Affiliate
James F. Watkins
Elizabeth Watts
Robert Watts, Sr.
Lindsey Weir
Wesjax Development Company
Western Railway of Alabama
Westfork Properties, Inc.
Jerome White
T. Carey Wicker
Patricia Wilkes
Williams & Connolly
Julie Williams
Geoffrey Vincent Williams
Glenda Williams
Robert James Williams
Michalene S. Wills
Forrest C. Wilson, Esq. – Hand Arendall, L.L.C.
Winston – Salem Southbound Railway Company
David G. Wirtes, Esq. – Cunningham, Bounds, et al
Woodstock & Blocton Railway Company
James A. Yance
Tracey Anne Yates
Michael A. Youngpeter
Alex W. Zoghby
Grace Zotara

APPENDIX F

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.